Supreme Court, U.S.
FILED
JUL 12 1994
OFFICE OF THE CLERK

No. 94-73

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Oklahoma

PETITION FOR WRIT OF CERTIORARI

JAMES D. ELLIS
LIAM S. COONAN
MELANIE S. FANNIN
ROGER K. TOPPINS
PAUL K. MANCINI
SOUTHWESTERN BELL TELEPHONE COMPANY

ANDREW M. COATS
RICHARD C. FORD
CROWE & DUNLEVY
1800 Mid-America Tower
20 N. Broadway
Oklahoma City, OK 73102

KENNETH W. STARR
Counsel of Record
ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner

Dated: July 12, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Oklahoma Supreme Court held that a biased decisionmaker could participate in a ratemaking proceeding because (1) procedural due process protections do not apply to ratemaking proceedings; or alternatively (2) the Rule of Necessity justifies the participation of biased decisionmaking on adjudicatory bodies where no statutory means for replacing them is available. In light of this holding, the question presented is: Whether States may deny all procedural due process protection in ratemaking proceedings, by labelling such proceedings "legislative" and applying the Rule of Necessity.

PARTIES TO THE PROCEEDING

Petitioner Southwestern Bell Telephone Company was petitioner below on petition to the Oklahoma Supreme Court for a writ of prohibition. Respondent Oklahoma Corporation Commission was respondent below.

Pursuant to this Court's Rule 29.1, petitioner notes that its parent is Southwestern Bell Corporation. Southwestern Bell Corporation has 16 directly owned subsidiaries in addition to Southwestern Bell Telephone Company, all of which are, like Southwestern Bell Telephone Company, wholly owned by Southwestern Bell Corporation. Southwestern Bell Telephone Company has two non-wholly-owned subsidiaries: Bell Communications Research, Inc. and Database Services Management, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. Due Process and State Administrative Agencies	4
B. Proceedings Below	5
REASONS FOR GRANTING THE WRIT	8
I. THE OKLAHOMA SUPREME COURT DECISION VIOLATES THIS COURT'S DUE PROCESS PRECEDENTS ON A MATTER OF CRITICAL IMPORTANCE TO UTILITIES AND THEIR CUSTOMERS	8
A. The Oklahoma Supreme Court's Determination That the Due Process Clause Does Not Apply to Ratemaking Proceedings Conflicts With This Court's Due Process Precedents	8
B. The Oklahoma Supreme Court's Alternative Holding That the Rule of Necessity Can Defeat Southwestern Bell's Due Process Claim Conflicts With This Court's Precedents	12
C. Under the Oklahoma Supreme Court's Decision Due Process Protection Will *Never* Apply in State Rate Proceedings	13

TABLE OF CONTENTS—Continued

Page

D. The Oklahoma Corporation Commission Wields Vast Powers That Ought Not Be Placed Beyond the Reach of Due Process 15

II. THIS COURT'S REVIEW IS WARRANTED TO ESTABLISH THAT "RATEMAKING" IS NOT A CATEGORY OF DUE PROCESS ANALYSIS 15

III. THIS COURT'S REVIEW IS WARRANTED TO RECONCILE CONFLICTING STATE COURT RULE OF NECESSITY DECISIONS .. 18

CONCLUSION 19

APPENDIX A: OPINION OF THE OKLAHOMA SUPREME COURT ON REHEARING 1a

APPENDIX B: INITIAL OPINION OF THE OKLAHOMA SUPREME COURT 60a

APPENDIX C: OPINION OF THE OKLAHOMA SUPREME COURT IN THE UNDERLYING RATEMAKING PROCEEDING 75a

APPENDIX D: PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 103a

TABLE OF AUTHORITIES

Cases: Page

Association of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) 13
Bi-metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) 9
Burford v. Sun Oil Co., 319 U.S. 315 (1943) 17
Business and Professional People for Public Interest v. Barnich, 614 N.E.2d 341 (Ill. App. Ct. 1993) 16
Clisham v. Board of Police Commissioners, 613 A.2d 254 (Conn. 1992) 18
Colorado Interstate Gas Co. v. Federal Power Comm'n, 324 U.S. 581 (1945) 10
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 17
Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264 (1993) 4, 9, 11
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1982) 10
Earle M. Jorgensen Co. v. City of Seattle, 665 P.2d 1328 (Wash.) (en banc), *cert. denied*, 464 U.S. 982 (1983) 16
Fireman's Fund Ins. Co. v. Garamendi, 790 F. Supp. 938 (N.D. Cal. 1992) 17
Gibson v. Berryhill, 411 U.S. 564 (1973) 4
Gulf States Utilities Co. v. Louisiana Public Serv. Comm'n, 578 So.2d 71 (La.), *cert. denied*, 112 S. Ct. 637 (1991) 16
Hibbing Taconite Co. v. Minnesota Public Serv. Comm'n, 302 N.W.2d 5 (Minn. 1980) 16
Londoner v. Denver, 210 U.S. 373 (1908) 9
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 5
Michigan Intra-State Motor Tariff Bureau, Inc. v. Public Serv. Comm'n, 504 N.W.2d 677 (Mich. Ct. App. 1993) 16
Missouri v. Jenkins, 495 U.S. 33 (1990) 12, 13, 18
New England Tel. & Tel. Co. v. Public Utilities Comm'n, 448 A.2d 272 (Me. 1982) 16

TABLE OF AUTHORITIES—Continued

	Page
New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989)	10
Northwestern Bell Tel. Co. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990)	16
Offut v. United States, 348 U.S. 11 (1954)	5
Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio, 301 U.S. 292 (1937)	11, 17
Opdahl v. Zeeland Pub. School Dist. No. 4, 512 N.W.2d 444 (N.D. 1994)	18
Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908)	*passim*
Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)	17
Ratepayers Coalition of Rochester v. Rochester Electric Light and Power Co., 571 A.2d 606 (Vt. 1989)	16
Southern Ry. Co. v. Virginia, 290 U.S. 190 (1933)	10
Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n, 873 P.2d 1001 (Okla. 1994)	*passim*
Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n, No. 80,579, slip op. (Okla., May 25, 1993)	6
Stahl v. Board of Supervisors of Ringgold County, 175 N.W. 772 (Iowa 1920)	18
State v. Aldridge, 103 So. 835 (Ala. 1925)	18
State ex rel. Brown v. City of O'Fallon, 728 S.W.2d 598 (Mo. Ct. App. 1987)	18
State ex rel. Henry v. Southwestern Bell Tel. Co., 825 P.2d 1305 (Okla. 1991)	5
State ex rel. Spire v. Northwestern Bell Tel. Co., 445 N.W.2d 284 (Neb. 1989)	16
Tennessee Cable Television Ass'n v. Tennessee Public Serv. Comm'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992)	16
Tumey v. Ohio, 273 U.S. 510 (1927)	4, 5
United States v. Florida E. Coast Ry., 410 U.S. 224 (1973)	9
United States v. Will, 449 U.S. 200 (1980)	12
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	4, 11

TABLE OF AUTHORITIES—Continued

	Page
West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63 (1935)	11, 17
West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 79 (1935)	11, 17
Wiley v. Oklahoma Natural Gas Co., 429 P.2d 957 (Okla. 1967)	16
Younger v. Harris, 401 U.S. 37 (1971)	17
Statutes:	
OKLA. CONST. art. 9, § 18a	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94- —

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Oklahoma

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Southwestern Bell Telephone Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Supreme Court entered in the above-captioned case on April 13, 1994.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma after rehearing, dated April 13, 1994, is reported at 873 P.2d 1001 and is reproduced at pages 1a-59a of the appendix to this petition ("Pet. App."). The initial opinion of the Supreme Court of Oklahoma, dated May 25, 1993, has been withdrawn, but is reproduced at Pet. App. 60a-74a. The opinion of the Supreme Court of Oklahoma in the underlying rate hearing is reported as *State ex rel.*

Henry v. Southwestern Bell Tel. Co., 825 P.2d 1305 (Okla. 1991), and is reproduced at Pet. App. 75a-102a.

JURISDICTION

Petitioner Southwestern Bell Telephone Company sought from the Oklahoma Supreme Court a writ of prohibition to disqualify one of the three Oklahoma Corporation Commissioners from participating in Southwestern Bell Telephone Company cases before the Oklahoma Corporation Commission. The Oklahoma Supreme Court accepted jurisdiction and granted the writ in an opinion dated May 25, 1993. After a timely motion for rehearing, the Oklahoma Supreme Court reversed itself and denied Southwestern Bell's request in a judgment and opinion dated April 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The provisions of the Oklahoma Constitution involved in this case, Art. 9, §§ 16-20, are reproduced at Pet. App. 103a-110a.

STATEMENT OF THE CASE

This case brings before the Court an important, foundational issue in the modern administrative state—whether the Due Process Clause affords protection to companies whose rates are regulated by the several States. In a dramatic about-face, the Oklahoma Supreme Court reversed its earlier ruling and answered that question in the negative. That action not only banished from the shelter of due process a system of civil adjudication that affects millions of ordinary citizens and determines utility

rates worth billions of dollars, but it brought about a revolution in traditional understandings of the rule of law in state ratemaking proceedings.

This case arises out of proceedings before the Oklahoma Corporation Commission, Oklahoma's most powerful administrative agency. Comprised of three elected commissioners, the commission regulates public utilities, common carriers, the oil and gas industry, and a host of miscellaneous activity.

The case involves an Oklahoma Corporation Commissioner who revealed in 1992 that he had been secretly acting as an FBI informant against Southwestern Bell Telephone Company ("SWB") since his election to the Commission in 1988. On October 2, 1992, a month before a congressional election in which he was an unsuccessful candidate, Corporation Commissioner Robert H. "Bob" Anthony announced publicly that he had "worked with the FBI" for the previous four years "to investigate corruption at the Corporation Commission." Though often phrased in general terms, Commissioner Anthony's statement repeatedly named SWB, but no other utilities. Anthony described activities he had undertaken as an undercover informant, and he implied that he anticipated serving as a witness against the accused utilities in future criminal proceedings.[1]

One week after his announcement, Commissioner Anthony filed an administrative discovery request against Southwestern Bell, requesting documents related not to

---

[1] This expectation has not been realized. The FBI's investigation has concluded, and no current or former Southwestern Bell employees have been indicted as a result of it. The one figure connected to SWB who was indicted, a lawyer who formerly served SWB and other regulated companies as outside counsel, has yet to be tried. For the record, Southwestern Bell's position is this: Any impropriety that may have been committed was not authorized by or attributable to it.

any regulatory issues, but to his investigation of alleged corruption. Some months later, he revealed that, as part of his FBI informant activities, he had secretly tape-recorded conversations with Southwestern Bell employees and lawyers. All this occurred at times when Commissioner Anthony was presiding over regulatory cases in which SWB was a party. Commissioner Anthony asserted that his actions—and the timing of his announcement of them—were not determined by motives of political gain: "I come forward at this time." he said, "because the parties to cases at the Corporation Commission have rights which must be protected." He declared, "The parties to this case should pursue whatever remedies are necessary to protect their rights." *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001, 1003 n.1 (Okla. 1994) ("*SWB II*"), 2a. Southwestern Bell responded to this invitation by requesting Commissioner Anthony's recusal on grounds of bias under the federal Due Process Clause.

A. Due Process and State Administrative Agencies

The Due Process Clause of the Fourteenth Amendment requires State administrative agencies to adhere to fair procedure when deciding cases that could deprive parties of life, liberty, or property. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). One aspect of this right is the due process requirement of a "neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). At least since *Tumey v. Ohio*, 273 U.S. 510 (1927), the rule has been that "[o]ne is entitled as a matter of due process of law" to an adjudicator not situated so as to " 'offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true . . . .' " *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern*

California, 113 S. Ct. 2264, 2277 (1993) (quoting *Tumey*, 273 U.S. at 532). "[J]ustice must satisfy the appearance of justice." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954)). As will be seen, the Oklahoma Supreme Court has flouted these fundamental principles.

B. Proceedings Below

The case in which Mr. Anthony's accusations against Southwestern Bell arose, captioned Cause No. PUD-260, was, until his announcement, a straightforward ratemaking proceeding. Because of tax savings from the 1986 Tax Reform Act, Southwestern Bell accumulated a $30 million "cash surplus" between 1987 and 1989, which it agreed in principle to refund to its customers. At issue in PUD-260 was not the gross amount of SWB's tax savings, but the amount of possible offsets to that surplus and the method by which SWB should refund it. After the Commission ruled on these issues, the Commission's order was reviewed by the Oklahoma Supreme Court, *State ex rel. Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305, 1309 (Okla. 1991), 80a, which approved an in-kind refund through investing the surplus in upgraded equipment. The Court then remanded the case to the Commission for further consideration of four technical issues specific to SWB, namely which "central office" facilities were most in need of improvement, *id.* at 1313, 88a; and the appropriate offsets to the gross surplus for "depreciation reserve deficiencies," *id.* at 1314-17, 89a-96a; severance pay, *id.* at 1317-18, 96a-98a; and "cash working capital," *id.* at 1318-19, 98a-100a.

Shortly after Commissioner Anthony's dramatic announcement, Southwestern Bell accepted his invitation "to pursue whatever remedies are necessary to protect [its] rights," *SWB II*, 873 P.2d at 1003 n.1, 2a, and filed a motion with the Commission requesting Commissioner Anthony's recusal from the PUD-260 remand proceedings and future SWB cases. When that motion was re-

buffed by the Commission, Southwestern Bell petitioned the Oklahoma Supreme Court for the same relief, arguing that recusal was required by the Due Process Clause of the United States Constitution.

In its initial decision, the Oklahoma Supreme Court, speaking through Justice Opala for a 6-1 majority, agreed that "[b]ecause the principle of impartiality that governs the *cold neutrality and detachment* of judges applies with equal force to administrative adjudicators," Commissioner Anthony had to be disqualified from participating in PUD-260. *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, No. 80,579, slip op. at 4-5 (Okla., May 25, 1993) ("*SWB I*") (emphasis in original), 64a. The court then adapted certain existing statutory procedures to allow the Oklahoma Governor to appoint a replacement for Commissioner Anthony to serve in his stead in this one case. The court "save[d] for another day" the issue of whether Commissioner Anthony should similarly be disqualified from *future* SWB rate proceedings. *SWB I* at 5, 65a.

Alone in dissent, Justice Simms objected to the Court's willingness to countenance the participation in Corporation Commission proceedings of an unelected Commissioner. He said, "Today the majority has stripped the sovereign power of the people of this State to choose the members of the Corporation Commission and placed it in the hands of this Court and the Governor." *SWB I*, slip op. dissent at 1 (Simms, J., dissenting), 72a. Justice Simms also invoked *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), an opinion authored by Justice Holmes interpreting a federal statute forbidding federal courts to enjoin state judicial proceedings. Justice Simms cited *Prentis* for the proposition that "rate-making is a legislative function of the Corporation Commission" and argued that "persons acting in a legislative capacity" need not "meet standards [of impartiality] required of judicial decision makers." *SWB I*, slip op. dissent at 2, 72a-73a.

In response to this dissent, the Corporation Commission, relying on *Prentis*, petitioned the Oklahoma Supreme Court to reconsider its decision.

On rehearing, the Oklahoma Supreme Court did an about face. In a 5-4 opinion joined by Justice Simms, Justices Wilson and Watt, who had changed their minds, and two Oklahoma appellate judges sitting by designation for recused justices, the court relied on the narrow *Prentis* argument of Justice Simms's earlier dissent. The court reasoned that all ratemaking is "legislative" and that the Due Process Clause places *no* limitations on the conduct of legislative proceedings. For good measure, it also denied Southwestern Bell's claim a second time, relying on the so-called "Rule of Necessity." Commissioner Anthony's participation was necessary under this rule, the court explained, because no statutory mechanism existed for his replacement, and without him, the remaining two commissioners might deadlock. The court made clear that its reasoning would compel it to deny *all* due process claims arising from ratemaking proceedings. Justice Opala, the author of the original decision, issued a scholarly dissent, 19a-59a, arguing that due process protections against biased decisionmakers apply fully in cases of "individual ratemaking." 19a.

REASONS FOR GRANTING THE WRIT

I. THE OKLAHOMA SUPREME COURT DECISION VIOLATES THIS COURT'S DUE PROCESS PRECEDENTS ON A MATTER OF CRITICAL IMPORTANCE TO UTILITIES AND THEIR CUSTOMERS.

Instead of faithfully applying this Court's due process precedents, the Oklahoma Supreme Court sought assiduously to avoid having to disqualify an obviously biased Corporation Commissioner. First, it embarked on a safari through the U.S. Reports, tracking down decisions that could be cited for the proposition that ratemaking proceedings are "legislative" and hence not entitled to due process protection. Although ascertaining whether Southwestern Bell experienced a "depreciation reserve deficiency" between January 1987 and September 1989 scarcely seems a "legislative" endeavor, the court was able to bag and put to use several precedents implying that ratemaking is "essentially" a legislative act. Next, once it had collected this authority and used it in denying Southwestern Bell's petition, the court proceeded to deny due process protection in all likely future rate cases as well. The court's decision is wildly inconsistent with first principles of due process and is of profound importance in the high-stakes world of state ratemaking proceedings.

A. The Oklahoma Supreme Court's Determination That the Due Process Clause Does Not Apply to Ratemaking Proceedings Conflicts with This Court's Due Process Precedents.

The Oklahoma Supreme Court's *volte face* sounds the death knell for procedural due process in state ratemaking proceedings. Not surprisingly, this due process heresy finds no support in this Court's precedents.

First, the Oklahoma Supreme Court's decision finding that these individual ratemaking proceedings are "legisla-

tive," and hence unprotected by due process, directly conflicts with the decisions of this Court in *Londoner v. Denver*, 210 U.S. 373 (1908), *Bi-metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), and *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973). The Oklahoma court correctly assumed that "the rigid requirements designed for officials performing judicial or quasi-judicial functions," *Concrete Pipe*, 113 S. Ct. at 2277 (internal quotation marks and citation omitted), are not applicable to those acting in "legislative" capacities. In determining that these proceedings are "legislative," however, it ignored this Court's due process precedents. "The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Proces Clause of the Fourteenth Amendment"—namely, *Londoner* and *Bi-metallic*. *Florida E. Coast Ry.*, 410 U.S. at 244. In *Londoner*, this Court held that due process required that a landowner be given a hearing to contest the amount of an assessment levied specifically against his land. *See id.* at 244-45. In *Bi-metallic*, the Court held that due process did not require a hearing where the assessed "valuation of all taxable property in Denver" was increased. *Id.* at 245. Ratemaking "applicable across the board to all . . . common carriers" is therefore legislative; ratemaking that "single[s] out any particular" company is adjudicative. *Id.* at 245-46. Because the PUD-260 remand proceedings involve Southwestern Bell alone, the Oklahoma court's holding that they are "legislative" for purposes of due process conflicts with this Court's decisions.

Second, the Oklahoma Supreme Court's application to a due process claim of rules from other contexts holding (1) that ratemaking proceedings are legislative and (2) that proceedings having only prospective effect are legislative, likewise conflicts with this Court's due process decisions. In concluding that this proceeding is "legislative,"

the Oklahoma Supreme Court failed to cite the *Londoner/Bi-metallic* line of precedent—or any other due process decision of this Court. It appealed instead to this Court's decisions from other contexts, relying mainly on *Prentis*, which interpreted a statute limiting federal courts' authority to enjoin proceedings in state court.[2] The Oklahoma Supreme Court invoked *Prentis*'s dictum that "[t]he establishment of a rate is the making of a *rule for the future*, and therefore an act *legislative*, not judicial, in kind." *SWB II*, 873 P.2d at 1005 (emphasis added), 6a.

The Oklahoma Supreme Court's use of *Prentis*'s suggestions that "rule[s] for the future" are legislative and ratemaking proceedings are legislative as premises for concluding that ratemaking enjoys no due process protection conflicts with this Court's precedents. In *Southern Ry. Co. v. Virginia*, 290 U.S. 190 (1933), this Court held that due process required notice and a hearing before a railroad could be ordered to upgrade a particular crossing. *Id.* at 199. Although the case manifestly involved what *Prentis* would style "a rule for the future," the Court expressly rejected the argument that due process was inapplicable because the administrative order demanding the upgrade was analogous to legislation. *Id.* at 197. Likewise, this Court has frequently held that

---

[2] The Oklahoma court also relied on other cases not decided on due process grounds. *See SWB II*, 873 P.2d at 1005-06, 7a (citing *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 371 (1989) (applying *Younger* abstention; "ratemaking is an essentially legislative act"); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1982) (applying statutes governing review of judgments of the District of Columbia Court of Appeals; "[*Prentis*] held . . . the Commission had acted in a legislative as opposed to a judicial capacity"); and *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945) (applying the Natural Gas Act of 1938; "[r]atemaking is essentially a legislative function")).

principles of due process, including "the fundamentals of a fair hearing," apply in cases involving ratemaking proceedings. *See West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 63, 70 (1935) (*"West Ohio I"*); *West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 79, 82 (1935) (*"West Ohio II"*); *accord Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 304-05 (1937).

Third, the remedy suggested by the Oklahoma court in lieu of Commissioner Anthony's disqualification is also in conflict with this Court's precedents. The Oklahoma court held that "review by heightened scrutiny in the appellate court" is an appropriate "means of compensation" for any possible bias by an official who has not been disqualified. *SWB II*, 873 P.2d at 1009, 15a. This conflicts with this Court's recent decision in *Concrete Pipe*, 113 S. Ct. at 2277, which held that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator."

Finally, even the apparent implicit basis for the Oklahoma ruling—the court's reluctance to disqualify an elected official—is in conflict with this Court's precedent. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), this Court addressed whether a system whereby the mayor tried traffic offenses and assessed fines, when the mayor was also responsible for the village's finances, denied offenders their due process right to a trial before a distinterested and impartial judicial officer. It held that due process required the mayor's disqualification.

B. The Oklahoma Supreme Court's Alternative Holding That the Rule of Necessity Can Defeat Southwestern Bell's Due Process Claim Conflicts with This Court's Precedents.

As an alternative ground for decision, the Oklahoma court held that the Rule of Necessity would prejudice Commissioner Anthony's disqualification, even in "judicial" proceedings. It reasoned that because "there [was] no mechanism in the law for appointment of a replacement commissioner," *SWB II*, 873 P.2d at 1009, 15a, and "the concurrence of a majority" could not be assured without one, *id.*, the Rule of Necessity precluded the disqualification. This logic is also in conflict with this Court's precedents.

First, the Oklahoma court's holding that the Rule of Necessity applies where recusal would not destroy the litigants' "right to a *forum*" conflicts with this Court's decision in *United States v. Will*, 449 U.S. 200, 212 (1980) (emphasis added). In *Will*, this Court held that even though all nine Justices had an interest in a case brought under the Compensation Clause of Article III, the Rule of Necessity barred the disqualification of the entire Court, because the parties were entitled to have their case heard. Here, the Oklahoma Constitution permits the Corporation Commission to conduct business and vote with a quorum of two members. *See* OKLA. CONST. art. 9, § 18a. Because disqualifying Commissioner Anthony would not destroy the Corporation Commission forum, the Rule of Necessity as defined by *Will* does not bar his recusal.

Second, the holding that Southwestern Bell's due process rights can be extinguished by the lack of a statutory method for replacing disqualified commissioners conflicts with this Court's decision in *Missouri v. Jenkins*, 495 U.S. 33, 56 (1990). *Jenkins* held that once a constitutional violation has been proved, state law limitations on a court's ability to provide an appropriate remedy need not

be respected. *See id.* at 57 (holding that local governments "may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation").

C. Under the Oklahoma Supreme Court's Decision Due Process Protection Will *Never* Apply in State Rate Proceedings.

Liberating the Corporation Commission from *any* due process limitations on its ratemaking authority, the Oklahoma Supreme Court not only refused to disqualify Commissioner Anthony in this case, but also reached out in various directions to expand the set of cases governed by its decision. Read fairly, the decision precludes any procedural due process claim made in any rate proceeding before any state administrative agency.

First, the decision precludes *any* reliance on the Due Process Clause in administrative proceedings deemed "legislative" under *Prentis*. Had the Oklahoma court followed the leading precedent from the District of Columbia Circuit, its determination that these proceedings were "legislative" would not have ended the analysis, but would have called for the application of the rule of *Association of Nat'l Advertisers v. FTC*, which applies to claims of bias in legislative agency proceedings. *See Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Instead, the court simply held that "due process notice and hearing requirements" are "inapplicabl[e]" to "legislative" proceedings and concluded, without more, that no due process violation had occurred. *SWB II*, 873 P.2d at 1006, 9a.

Second, the Oklahoma decision holds that *all* ratemaking proceedings are "legislative" in character. To be sure, the decision can be read to admit hope of due process applying in "judicial" rate proceedings, where a "judicial" proceeding is one which "investigates, declares and

enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *SWB II*, 873 P.2d at 1005, 6a (quoting *Prentis*, 211 U.S. at 226). The facts of this case demonstrate, however, that this is ephemeral. At issue in the PUD-260 remand is the computation and use of excess monies paid by SWB customers in 1987, 1988, and 1989—well before the 1992 date on which SWB first sought Commissioner Anthony's disqualification. Nevertheless, the Oklahoma Supreme Court did not so much as consider *Prentis*'s apparent rule that proceedings determining backward-looking liabilities are "judicial" and hence protected by the Due Process Clause. If these rate proceedings do not merit due process protection under the Oklahoma court's rule, none do.

Third, the Oklahoma decision applies not just to the right to an impartial adjudicator, but to due process rights generally. In deciding Southwestern Bell's narrow claim for Commissioner Anthony's disqualification for bias, the court indicated that its analysis would apply across the board to "due process notice and hearing requirements," *SWB II*, 873 P.2d at 1006, 9a; and that the right to a neutral adjudicator was simply one example of this entirely foreclosed category of claims. *Id.* (refusing to recognize "the application of due process requirements, including neutrality").

Fourth, after denying Southwestern Bell's claim on "legislative proceedings" grounds, the Oklahoma Supreme Court gratuitously denied it again under the Rule of Necessity. The court justified this overkill by arguing that "conserv[ing] judicial resources, as well as the resources of the rate payers" made it advisable to consider whether Commissioner Anthony could be disqualified from *future* judicial ratemaking proceedings. *SWB II*, 873 P.2d at 1009, 14a. Without examining any factual material, the court simply held that the Rule of Necessity demanded that "Commissioner Anthony would not be disqualified but would be allowed to continue to hear the

matter despite assertions of bias and prejudice." *SWB II*, 873 P.2d at 1009, 15a.

D. The Oklahoma Corporation Commission Wields Vast Powers That Ought Not Be Placed Beyond the Reach of Due Process.

The modest appellation, "Oklahoma Corporation Commission," does not suggest the extent of the power wielded by that body. According to its latest report, the Commission regulates 23,311 motor carriers, 35,000 miles of gas and hazardous liquid pipelines, 20 commercial oil field waste disposal pits, 197 public utilities, including 35 electric companies, 19 gas companies, 7 long-distance telephone companies, 46 local-exchange telephone companies, and on and on.[3] As in other States with their respective ratemaking machinery, only a small minority of Oklahoma citizens pass a month without paying a rate or using a service regulated by the Oklahoma Corporation Commission. In protecting the vast authority of this free-wheeling commission against any impairment by the Due Process Clause, the Oklahoma Supreme Court contradicted or ignored numerous decisions of this Court. Its implications for other States, now invited to shield ratemaking from federal due process scrutiny, are sobering for utilities and consumers alike. This case plainly warrants this Court's intervention.

II. THIS COURT'S REVIEW IS WARRANTED TO ESTABLISH THAT "RATEMAKING" IS NOT A CATEGORY OF DUE PROCESS ANALYSIS.

The doctrinal solecisms committed by the Oklahoma court appear in many state court decisions. Although this court's *due process precedents* certainly do not indicate that "ratemaking is legislative," state courts adjudi-

---

[3] The list includes 28 waterworks, 62 cotton gins, 5,714 railroad track miles, 2 soil farms, 1,540 surface storage tanks, 21,453 underground storage tanks, 94,065 oil wells, 27,935 gas wells, and 27,622 underground injection and disposal wells.

cating due process claims in ratemaking proceedings often use the adage as a doctrinal lodestar.[4]

---

[4] *See, e.g., Gulf States Utilities Co. v. Louisiana Public Serv. Comm'n*, 578 So.2d 71, 82-84 (La.) (ratemaking is legislative, so due process right to be heard by decisionmaker rather than hearing examiner not violated), *cert. denied*, 112 S. Ct. 637 (1991); *Northwestern Bell Tel. Co. v. Stofferahn*, 461 N.W.2d 129, 133-34 (S.D. 1990) (ratemaking is legislative for purposes of due process; *Association of Nat'l Advertisers* standard applies to disqualification for bias); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 445 N.W.2d 284, 295, 298 (Neb. 1989) ("Setting a rate . . . is a legislative act. . . . [T]he procedural due process requirement of notice and hearing" does not apply); *Earle M. Jorgensen Co. v. City of Seattle*, 665 P.2d 1328, 1332 (Wash.) (en banc) ("Since ratemaking is a legislative act, appellants' only due process right is in nonarbitrary rates."), *cert. denied*, 464 U.S. 982 (1983); *Tennessee Cable Television Ass'n v. Tennessee Public Serv. Comm'n*, 844 S.W.2d 151, 164-65 (Tenn. Ct. App. 1992) (different disqualification standards apply in ratemaking proceedings than in adjudicative proceedings); *Ratepayers Coalition of Rochester v. Rochester Electric Light and Power Co.*, 571 A.2d 606 (Vt. 1989) (ratepayers not entitled to notice of rate hearing because "[r]atemaking proceedings that affect customers of a utility generally are legislative in nature"); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957, 958 (Okla. 1967) (ratepayer's challenge to rate order because of alleged bias of Commissioners denied, because ratemaking is legislative); *but see Hibbing Taconite Co. v. Minnesota Public Serv. Comm'n*, 302 N.W.2d 5, 9 (Minn. 1980) (ratemaking is *both* quasi-judicial and legislative; "court's failure to be more precise when discussing the two phases of ratemaking has led to the inappropriate statement that 'ratemaking is a legislative process' "); *New England Tel. & Tel. Co. v. Public Utilities Comm'n*, 448 A.2d 272, 280 (Me. 1982) (due process requires impartial hearing in ratemaking proceeding); *Business and Professional People for Public Interest v. Barnich*, 614 N.E.2d 341, 345 (Ill. App. Ct. 1993) (ratemaking proceedings are contested cases, judicial or quasi-judicial in nature, thus requiring same standards of disqualification for ratemaker's bias as for judge's bias); *Michigan Intra-State Motor Tariff Bureau, Inc. v. Public Serv. Comm'n*, 504 N.W.2d 677, 679, 682 (Mich. Ct. App. 1993) (ratemaking is legislative function, but the entities regulated are entitled to an impartial decisionmaker).

The reason for this confusion among the state courts is understandable: Federal courts generally, and this Court in particular, have had little occasion in recent years to address due process requirements for ratemaking proceedings. Since the most recent of the due process ratemaking decisions relied on above were decided—*see, West Coast I* (1935), *West Coast II* (1935), *Ohio Bell Telephone* (1937)—two sea changes have occurred in the law. First, Congress passed the Administrative Procedure Act. By affording parties in *federal* ratemaking proceedings all the process constitutionally due them, this statute has, as to federally set rates, made the Due Process Clause largely obsolete. Second, since the early 1940s this Court has recognized a host of abstention doctrines requiring federal courts to stay their hand in favor of State courts and regulatory bodies. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Today, when regulated companies attempt to attack *state* ratemaking procedures on due process grounds, they are met with a phalanx of abstention arguments on the way to the federal courthouse. *See, e.g., Fireman's Fund Ins. Co. v. Garamendi*, 790 F. Supp. 938 (N.D. Cal. 1992) (defendant requested abstention on federal constitutional claims, including due process claims, on basis of *Pullman, Burford, Younger*, and *Colorado River*; court grants abstention under latter three doctrines).

Because this Court used to address due process requirements for ratemaking, but no longer does so, state courts confronting such issues must either (1) apply the proper precedents from 50 to 100 years ago, or (2) apply recent decisions that are not on point. They mostly do the latter. If the resulting confusion in the state courts is to be dispelled, this Court should state authoritatively where the legislative-versus-adjudicative line is to be drawn *under the Due Process Clause.*

III. THIS COURT'S REVIEW IS WARRANTED TO RECONCILE CONFLICTING STATE COURT RULE OF NECESSITY DECISIONS.

The Rule of Necessity appears in many contexts other than ratemaking proceedings—disciplinary proceedings against public employees or licensed professionals, claims for public assistance, and adjudications concerning levies against real property are examples. Although sometimes styled a "common law" rule, as in this case, *see SWB II*, 873 P.2d 1009, 15a, the "common law" appellation is an obvious misnomer where, as here, it is used to jettison constitutional rights. In cases such as this, where unconstitutional bias has been alleged and the Rule of Necessity has been applied, the Rule of Necessity is a strand of due process analysis.

At present, the Rule of Necessity is a rule of absolute necessity in some jurisdictions and a rule of convenience in others. *Missouri v. Jenkins* notwithstanding, the Supreme Court of North Dakota held recently that "where no provision has been made" for substitute adjudicators, the Rule of Necessity "requires otherwise disqualified officers to serve." *Opdahl v. Zeeland Pub. School Dist. No. 4*, 512 N.W.2d 444, 446 (N.D. 1994). Yet other state supreme courts decline to apply the rule "merely because [a] town has not provided a procedure for replacing disqualified [adjudicators]." *See Clisham v. Board of Police Commissioners*, 613 A.2d 254, 265 (Conn. 1992). This Court's guidance is required if lower courts are to apply the rule consistently.[5]

---

[5] Other decisions in conflict with Oklahoma Supreme Court's Rule of Necessity holding include *State ex rel. Brown v. City of O'Fallon*, 728 S.W.2d 595, 597-98 (Mo. Ct. App. 1987); *State v. Aldridge*, 103 So. 835, 838 (Ala. 1925); and *Stahl v. Board of Supervisors of Ringgold County*, 175 N.W. 772, 776 (Iowa 1920).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

JAMES D. ELLIS
LIAM S. COONAN
MELANIE S. FANNIN
ROGER K. TOPPINS
PAUL K. MANCINI
SOUTHWESTERN BELL
TELEPHONE COMPANY

ANDREW M. COATS
RICHARD C. FORD
CROWE & DUNLEVY
1800 Mid-America Tower
20 N. Broadway
Oklahoma City, OK 73102

KENNETH W. STARR
Counsel of Record
ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner

Dated: July 12, 1994

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 80,579

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

Petitioner seeks this Court's assumption of original jurisdiction and petitions for writ of prohibition to disqualify Corporation Commissioner Anthony from further participation in PUD-260 and all pending or future cases involving petitioner before the Commission.

APPLICATION TO ASSUME ORIGINAL JURISDICTION GRANTED. PETITION FOR WRIT OF PROHIBITION DENIED.

REHEARING GRANTED AND OPINION OF THE COURT ISSUED MAY 25, 1993, IS WITHDRAWN AND THIS OPINION ORDERED SUBSTITUTED THEREFOR.

SIMMS, J:

In this original proceeding Southwestern Bell Telephone Company (SWB) seeks this Court's order disqualifying Corporation Commissioner Anthony (Anthony) from further participation in Corporation Commission proceeding PUD-260, a rate hearing, as well as in all pending and future SWB cases. SWB asserts that Anthony is biased and prejudiced against it, and his continued participation in cases where its substantive rights are at issue will deny SWB its right to due process of law because it will not be able to receive a fair hearing from an impartial tribunal.

I.

The focus of SWB's claim centers on Commissioner Anthony's starting public announcement on October 2, 1992, that for four years he had been secretly acting as an investigator and informant in an ongoing FBI investigation concerning the conduct of his fellow commissioners and employees and representatives of SWB.[1] SWB as-

---

[1] That statement in its entirety follows:

"As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to Southwestern Bell case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with Southwestern Bell and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.

"As an additional matter which has at least partial bearing on the PUD 260 case or other Southwestern Bell cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner in 1989, individuals associated with regulated companies have offered me cash or inducements.

"With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave

serts that Anthony's announcement makes it clear that he has formed an opinion that SWB's agents and employees have engaged in improper conduct; that he has conflicting interests because of his different public and undisclosed roles, and, as a result of his investigation, he may be a potential witness in future proceedings against SWB. These facts, SWB argues, make it patently impossible for Anthony to be a neutral and unbiased adjudicator of its rights and interests before the Commission.

SWB argues that the same federal and state due process requirements which assure litigants in judicial proceedings a right to be heard by an impartial judge in a fair hearing apply with equal force in administrative hearings, and they should apply to the Corporation Commission hearing on PUD-260 and to Commissioner Anthony who sits, SWB contends, in an adjudicatory capacity. SWB asserts that Anthony's conduct and public statement, together with a motion he filed in the case below, seeking to compel SWB to produce certain records, present fundamental issues regarding its right to due process. SWB claims that Anthony's position is the same as a judge and the Canons of Judicial Conduct, 5 O.S. 1991, Ch. 1, App. 4, require him to voluntarily disqualify in these circumstances. Because he refuses to do so,

---

to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.

"Furthermore, I will report that more than a year ago I separately advised a Southwestern Bell senior corporate officer and then later a senior corporate attorney with Southwestern Bell of the conduct of persons associated with their firm.

"I have delayed making this announcement for as long as possible in order to avoid compromising the Federal investigation. I have been advised a limited announcement pursuant to my commission responsibilities should have no adverse consequence on the FBI's investigation. I come forward at this time because the parties to cases at the Corporation Commission have rights which must be protected."

this Court should exercise its Okla. Const. Art. 7, Sec. 4 superintending control over the judiciary and issue its writ to prohibit Anthony from further participation in an adjudicatory capacity in SWB's cases.

We assume original jurisdiction but deny the requested relief. Rehearing of our decision issued on May 25, 1993, is granted and that decision is withdrawn.

II.

The Corporation Commission is created by Article 9 of our Constitution. Its three members are elected by the people at a general election and a concurrence by a majority of the Commission is necessary to decide any question. Among the many powers and duties given the Commission, it is required to exercise the authority of the state to supervise, regulate and control public service corporations, and to that end it has been clothed with legislative, executive and judicial powers. Okla. Const. Art. 9, §§ 15, 18, 19, and 20. *St. Louis & S.F.R. Co. v. Williams,* 25 Okla. 662, 107 P. 428 (1910). *Russell v. Walker,* 160 Okla. 145, 15 P.2d 114 (1932); *Oklahoma Cotton Ginners' Ass'n. v. State,* 174 Okla. 243, 51 P.2d 327 (1935).

The validity of the union of these powers in one constitutional body has been upheld and found consistent with the sepaartion of powers provision, Okla. Const. Art. 4, § 1, as well as Okla. Const. Art. 7, § 1, which vests judicial power in certain constitutionally and statutorily created courts and tribunals. *Monson v. State, ex rel., Oklahoma Corp. Comm.,* 673 P.2d 839 (Okla. 1983); *Oklahoma Cotton Ginners' Ass'n.,* supra. In any proceeding the requirements which the Commission's actions must meet and the standards by which they are measured, depend on the character of the particular power being exercised in the matter at issue. *Monson,* supra; *Oklahoma Cotton Ginners' Ass'n.,* supra.

For example, in *Monson*, an action involving the drilling of salt water disposal wells, we recognized that when the Commission sits and decides matters in its adjudicative capacity, it exercises the power of a court of record pursuant to Okla. Const. Art. 9, § 19, and the Commission should therefore be treated as the "functional analogue of a court of record." We held that because the Commission's actions in question were a judicial function, the exemption acorded the judiciary in the Open Meeting Law would apply to the Commission. Likewise, in *Hair v. Okla. Corp. Comm.*, 740 P.2d 134 (Okla. 1987), which involved a drilling and spacing order, we held that because the Commission is considered a court of record when it is performing in a judicial capacity, it may correct its orders by order nunc pro tunc.

The proceeding at issue here, PUD-260, is a rate hearing.[2] The authority to establish rates for all public service corporations is exclusively vested in the Corporation Commission by Art. 9, § 18, of the Oklahoma Constitution. Rate hearings are legislative in nature, and SWB's assertion that this was a proceeding of a judicial nature is erroneous. *Turpen v. Oklahoma Corp. Comm.*, 769 P.2d 1309 (Okla. 1989); *State, ex rel. Cartwright v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983); *Chickasha Cotton Oil Co. v. Corp. Comm.*, 562 P.2d

---

[2] PUD-260 began as an investigation into the effect of the Federal Tax Reform Act of 1986 on Oklahoma utilities. The initial Commission order was affirmed in part and reversed in part and remanded for further proceedings in *Henry v. Southwestern Bell*, 825 P.2d 1305 (Okla. 1992). No argument is advanced here that this is not a rate hearing nor could such an argument be sustained, for the Court found in *Henry* that the rates charged were authorized and were not obtained by overcharging ratepayers, and that the surplus cash at issue did not result from charges in excess of the legal rate. The Court specifically held at 1311 that the refund statute, 17 O.S. 1991, § 121, was therefore not applicable to these facts and afforded no authority for requiring the refund sought by the parties.

507 (Okla. 1977); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957 (Okla. 1967).

When Anthony and his fellow Commissioners hear PUD-260 they will act in their legislative capacity. That distinction is determinative of the issue presented for, as discussed below, proceedings which are legislative in nature do not implicate judicial processes and do not require application of the judicial standards urged by SWB. More importantly, this Court has no power to grant the relief sought against constitutional officers acting in a legislative capacity.

In *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), the Supreme Court of the United States was asked to determine whether the federal courts could enjoin the Virginia Corporation Commission from enforcing railroad rates alleged to be confiscatory. At issue was the nature of the challenged commission action. The Virginia constitutional provision (which is nearly identical to provisions of our article 9) invested the Commission with legislative, executive, and judicial powers. The Court assumed that while the Commission was for some purposes, a court, which would be protected from interference by federal courts, in setting the rates the Commission had acted in a legislative capacity and could therefore be enjoined. Speaking through Justice Holmes, the court analyzed the distinctions between legislative and judicial proceedings:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, . . ."

The Court then made the point that:

> "Proceedings legislative in nature are not proceedings in a court, * * * no matter what may be the general or dominant character of the body in which they may take place. * * * That question depends not upon the character of the body, but upon the character of the proceedings. * * * And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up . . . The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case." 211 U.S. at 226-27, 29 S.Ct. at 69-70 (Citations omitted).

The Supreme Court of the United States has quite recently reaffirmed both the general mode of analysis used in *Prentis*, see *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and the specific holding of *Prentis* that ratemaking is a legislative act and ratemaking proceedings are legislative in nature. See *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U.S. 581, 65 S.Ct. 829, 89 L.Ed. 1206 (1945) and *New Orleans Public Service v. Council of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

We recognized and addressed the distinction between legislative and judicial functions in *Wiley v. Oklahoma Natural Gas*, 429 P.2d 957 (Okla. 1967), where, in a case with some obvious factual similarities to the matter

before us, we held the court was without power to declare rate increases void based on allegations that the Commission had been wrongfully influenced to approve them by contributions and favors from a lobbyist. The action was not an appeal from the amount of the rate as being either excessive or constitutionally confiscatory, only the decision making process was attacked. We stated:

> "It is universally recognized that the fixing of rate schedules for public utilities is a legislative process, and that a public service regulatory body acts in a legislative capacity in approving rate schedules. It necessarily follows that a rate order is a legislative enactment and not a judgment of a Court. Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150; Pioneer T. and T. Co. v. State, 40 Okl. 417, 138 P. 1033; 43 Am.Jur. Public Utilities and Services, Sec. 226; City of Poteau v. American Indian Oil and Gas Co., 159 Okl. 240, 18 P.2d 523; Ft. Smith and W. Ry. Co. v. State, 25 Okl. 866, 108 P. 407; Community Natural Gas Co. v. Corporation Commission, 182 Okl. 137, 76 P.2d 393; Western Oklahoma Gas and Fuel Co. v. State, 113 Okl. 126, 239 P. 588.
>
> "In the last cited cases this Court said, at page 591 of the Pacific Reporter that 'in the last analysis an order of the Corporation Commission fixing rates is entitled to the same consideration as if the Legislature had fixed them * * *.'
>
> "It is equally well settled that the judiciary cannot annul or pronounce void any act of the Legislature on any ground other than that of repugnancy to the constitution. Constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the constitution. The Court may not inquire into the motives of the Legislature, as motives cannot be made a subject of judicial inquiry for the

purpose of invalidating an act of the legislature." 429 P.2d at 958.

This recognition of the legislative nature of ratemaking proceedings and the resulting inapplicability of judicial concerns and standards, including due process notice and hearing requirements, has been repeatedly affirmed by this Court. In our recent decision in *State v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983), we set forth and relied on the following statement from *Chickasha Cotton Oil Co. v. Corporation Commission*, 562 P.2d 507, 509 (Okla. 1977):

> " 'We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned and was not required to give judicial due process notice and hearing to the Petitioners (users), unless specifically required by statute. There is no present statutory provision requiring notice.'
>
> Accord, *State ex rel. Oklahoma Natural Gas Co. v. Hughes*, Okl., 227 P.2d 666 (669)(1951)."

See *Southern Oil Corp. v. Yale Natural Gas Co.*, 89 Okla. 121, 214 P. 131 (1923); *City of Bartlesville v. Corporation Commission*, 82 Okla. 160, 199 P. 396 (1921); *Chickasha Cotton Oil Co. v. Corporation Commission*, 562 P.2d 507 (Okla. 1977); *State v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983); *Henry v. Corporation Commission*, 825 P.2d 1262 (Okla. 1992). See also, *Teleco, Inc. v. Southwestern Bell Telephone Co.*, 392 F.Supp. 692 (WD Okla.1974), *aff'd* 511 F.2d 949, *cert. denied*, 423 U.S. 875, 96 S.Ct. 145, 46 L.Ed.2d 106 (1974).

Based on the foregoing analysis we are convinced that SWB's position that this was a judicial proceeding where Commissioner Anthony was performing an adjudicatory function which demanded the application of due process requirements, including neutrality, is erroneous. Instead,

PUD-260 was unarguably legislative in nature, and while participating in it Commissioner Anthony was acting in a legislative capacity which did not require him to comply with judicial standards of conduct. Accordingly, this Court is without jurisdiction to disqualify Commissioner Anthony from participation in this or any other SWB rate hearing.

Additionally, because of the legislative character of these proceedings, mandamus will not lie to compel Anthony's disqualification. As the terms of 12 O.S.1991, § 1451 make clear, mandamus will issue only where petitioner has a clear legal right to the relief sought and respondent has a plain legal duty which he refuses to perform. These requisites, together with inadequacy of other relief, must coincide to warrant issuance of the writ. *Oklahoma Gas & Electric Co. v. District Court*, 784 P.2d 61 (Okla. 1989). Here, respondent has no legal duty to perform, and petitioner has no right to the relief sought. Neither is prohibition a proper remedy to reach an act which is legislative in nature. Prohibition will lie only where an inferior court or officer is acting in a judicial capacity exercising judicial or quasi-judicial power not granted by law or making an unauthorized or excessive application of judicial force. *James v. Rogers*, 734 P.2d 1298 (Okla. 1987); *Stover v. Alfalfa County Election Board*, 530 P.2d 1020 (Okla. 1975).

We are also unpersuaded by the additional argument urged by SWB that although the Corporation Commission is exempted from the provisions of Art. II of the Administrative Procedures Act, 75 O.S. Supp. 1992, §§ 308a, et seq., we should nonetheless hold it bound by provisions of that article which impose certain due process requirements on agency proceedings, and especially by the terms of § 316 which call for the disqualification of agency members in some situations. That section provides:

> "A hearing examiner or agency member shall withdraw from any individual proceeding in which he

> cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined promptly by the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the Governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding. * * * "

The legislative nature of ratemaking ends any argument that the APA's standards of due process require treating the Commission the same as "other" agencies. Also, the Commission's constitutional creation distinguishes it from other administrative agencies which derive their authority "not from a direct constitutional grant but rather from statutory delegation." *Monson*, supra, at 842.

This statutory provision of directives for voluntary disqualification of agency members who sit by appointment and hearing officers who are agency employees together with a mechanism for their replacement, raise very different considerations from those presented by the situation before us. Here, we are asked to use the power of the judiciary to involuntarily disqualify an elected constitutional state officer in the absence of any constitutional or statutory provision allowing his disqualification or providing for a replacement. This Court has no power or authority to alter or interrupt the lawful term of Commissioner Anthony's office based on allegations of bias

in a rate hearing where he is acting in his legislative capacity, and any attempt to do so would be an encroachment by the judiciary on both the legislative and executive powers.

In addition to establishing his powers and duties, the constitution and statutes fix Commissioner Anthony's term of office. He is the legal incumbent and, pursuant to 51 O.S.1991, § 8, his office will not become vacant unless he should resign, die, move from the state, be convicted of certain offenses or be lawfully removed from office. *State, ex rel., Blankenship v. Freeman*, 440 P.2d 744 (Okla. 1968). The law does not recognize "bias" as creating a vacancy and, as no vacancy established by law exists, there is none to fill. *Carpenter v. Carter*, 167 Okla. 238, 29 P.2d 83 (1934).

Under Okla. Const. Art. 9, § 15 and 51 O.S.1991 § 10, the power to fill a vacancy in the office of Corporation Commissioner is placed in the governor. The law does not recognize a "temporary" vacancy as would result from a disqualification, however, as section 15 directs that the governor shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out the unexpired term.

The Court's lack of power to disqualify Commissioner Anthony from participation in SWB's rate hearing does not leave SWB defenseless and without a remedy for what it perceives as unfair treatment from a biased tribunal; SWB may appeal the Commission's rate order if it feels aggrieved by its provisions.

The denial of a fair rate of return resulting in confiscation of a utility's property is a constitutional concern of this Court. Okla. Const. Art. 9, § 20. After the ratemaking hearings on PUD-260 have concluded, if SWB believes that those Commission proceedings were so unfair because of Anthony's prejudice that the resulting rate order is unreasonable and confiscatory, it would be in a

position to assert that bias as a ground for reversal of the rate order. A record of the proceeding would exist to support its contentions of unfair treatment and arbitrary rulings on evidence and testimony.

As is appropriate in reviewing an order of the Corporation Commission involving an asserted constitutional violation, this Court will exercise its independent judgment as to both the law and the facts. *Atchison, Topeka & Santa Fe Ry. Co. v. State*, 692 P.2d 554 (Okla. 1984); *Application of Southwestern Bell Tel. Co.*, 575 P.2d 624 (Okla. 1978). We would therefore not be bound by the findings and conclusions of the Commission but would independently weigh the evidence in our determination of whether SWB had met its burden of proving the rates ordered by the Commission were confiscatory and fundamentally unfair.

III.

We recognize that an argument could be made that the provisions of Art. 9, § 20 which grant this Court the power to issue writs of mandamus and prohibition to the Commission in a proper case, support the power of this Court to disqualify a corporation commissioner, if he were sitting in a *judicial* capacity.

In pertinent part, that section provides:

> "From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, . . .
>
> . . . [I]n all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independ-

> ent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.
>
> No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, *that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.*" [Emphasis Added]

While this provision does not alter the fact that extraordinary relief would not be available to disqualify Anthony while acting in his legislative capacity, see *Wilson & Co., Inc. v. Oklahoma Gas & Electric Co.*, 190 Okla. 528, 126 P.2d 1009 (1942); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920), it might be argued that it could extend this Court's supervisory control over the issue of his disqualification while exercising judicial power. In this application SWB seeks relief in all its pending and future Commission matters in addition to PUD-260. We are aware that some of these proceedings may be of a judicial nature, and disqualification of Commissioner Anthony in his judicial capacity may be sought.

In an attempt to conserve judicial resources, as well as the resources of the rate payers, we observe in passing

that while an attempt to disqualify Anthony in a proceeding involving a judicial function might arguably be cognizable, it would likely lead to the same result reached in this legislative function decision today: Commissioner Anthony would not be disqualified but would be allowed to continue to hear the matter despite assertions of bias and prejudice. This is so because the "rule of necessity", which would undoubtedly be held applicable, would require that Anthony not be disqualified because the concurrence of a majority of the Commissioners is necessary for a decision, and there is no mechanism in the law for appointment of a replacement commissioner. The rule of necessity is a common law rule recognizing that a judge should not be disqualified where his jurisdiction is exclusive or there is no provision for appointing a replacement so that his disqualification would deny the constitutional right to a forum. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). The rule has been held applicable to state administrative proceedings where the administrative body was acting in an adjudicatory capacity. *Barker v. Secretary of State's Office of Missouri*, 752 S.W.2d 437 (Mo.App. 1988); *First American Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D. 1974), *cert. denied*, 419 U.S. 1026, 95 S.Ct. 798, 42 L.Ed.2d 816 (1978). It operates on the principle that "a biased judge is better than no judge at all" and the disqualification of a judge cannot be allowed to "bar the doors to justice or to destroy the only tribunal vested with the power" to hear the matter. *Barker*, supra, at 440.

A review by heightened scrutiny in the appellate court has been adopted as one means of compensation for any taint of bias that arises from a decision reached by an administrator who cannot be disqualified because of the rule of necessity. In *Barker v. Secretary of State's Office*, supra, the court considered a situation similar to the one before us in many respects other than the fact it involved an adjudicative process rather than a legislative one.

There, Barker, an employee of the Secretary of State's office in Missouri, allegedly received a back injury at work and filed a workers compensation claim which was denied at trial. Representing Barker's employer at the trial was an assistant attorney general, Hannelore Fischer, who was later appointed to the Labor and Industrial Relations Commission which hears appeals from the workers compensation trial courts. This three-member commission ruled against Barker 2 to 1. Fischer took no part in the review until a stalemate occurred; her vote against Barker was the deciding one.

Barker then appealed the commission decision to the Missouri Court of Appeals arguing Fischer should have been disqualified. After a discussion of the rule of necessity, the appellate court determined that it must be applied in the case because the Commission is the only tribunal for review of workers compensation cases provided by Missouri law. The court further found that a valid decision by the commission must be by majority of two members and that no mechanism for substituting a disqualified member existed. Hence, for the commission to perform its role of reviewing workers compensation cases, the rule required Fischer to sit and hear the matter, disagreeable as it may have been to Barker.

The appellate court determined that a heightened scrutiny on review was warranted, and stated:

> "This [consideration of the rule of necessity] does not, however, end our inquiry. We have agonized at great length to arrive at a fair and just solution to the problem posed by the unusual circumstances in the instant case. To this end we adopt the suggestion made by Professor Davis in his treatise on administrative law. Davis in his review of the law of necessity states:
>
> > The doctrine is so clear that it is seldom litigated, but when it causes results that are pal-

> pably unjust, perhaps it ought to be litigated, because ways can sometimes be found to relieve against the injustice. Whenever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, *without altering the law about scope of review,* may and probably should review with special intensity.
>
> 3 K. Davis Administrative Law Treatise § 19.9 (2d ed. 1980)
>
> The heightened scrutiny with which we review this case does not mean, however, that we are undertaking a de novo review. *Our scope of review is rigidly prescribed by statute and we will not stray out of the perimeters set for us by the legislature.*
>
> * * *
>
> *Our review of this case rather, will be done with a more critical eye than is usual. The record will be thoroughly examined to determine if any injustice has been done to Barker given the circumstances present.* 752 S.W.2d 441 (Emphasis added)."

If we applied the rule of necessity to a SWB adjudicatory matter with allegations similar to those urged here, it is likely that we would review the decision under a heightened appellate scrutiny or implement some other procedure to reach a just resolution of the competing interests involved in these strained circumstances.

We recognize that in a previous decision, *ETSI Pipeline Project, et al. v. Townsend,* Sup.Ct.No. 58,707, we granted a writ by unpublished order of September 9, 1982, disqualifying Commissioner Townsend from sitting in an adjudicative capacity. In that matter, however, no arguments were presented that the law did not provide for disqualification or replacement, and no argument as to the application of the rule of necessity was before us.

This order is not precedent. To the extent, however, that it is or may be seen as conflicting with today's decision, it is expressly overruled.

ORIGINAL JURISDICTION ASSUMED. PETITION FOR WRIT OF PROHIBITION DENIED. REHEARING GRANTED AND THE OPINION OF THE COURT ISSUED MAY 25, 1993 IS WITHDRAWN AND THIS OPINION IS ORDERED SUBSTITUTED THEREFOR.

SIMMS, WILSON, WATT, JJ., and ADAMS, SP.J., BOUDREAU, SP.J., CONCUR.

LAVENDER, V.C.J., HARGRAVE, OPALA, KAUGER, JJ., DISSENT.

HODGES, C.J., SUMMERS, J., DISQUALIFIED.

OPALA, J., dissenting.

This quest by Southwestern Bell Telephone Company [SWB] for a neutral and detached tribunal *does not turn* on whether the Corporation Commission's [Commission] public utility ratemaking may be described as "*legislative*" but rather on (1) *what process is constitutionally due* the corporate owners (stockholders) of a public utility when the State, acting in the exercise of its ratemaking powers, seeks to affect their property interests and on (2) whether Oklahoma may withdraw from the Commission's *individual ratemaking* [1] the basic protections of due process available to others by Art. II of the Oklahoma Administrative Procedures Act [APA] [2] without violating either the Equal Protection Clause of the 14th Amend., U.S. Const.,[3] or the uniformity-of-procedure mandate in Art. 5, § 46, Okl.Const.[4]

---

[1] *Individual ratemaking* is agency action for the establishment of rates which is directed at particular parties. The agency ratemaking process is usually based on individualized fact-finding—i.e., that which affects particular individuals, their businesses, activities and properties. *See B. Schwartz, Administrative Law* § 5.8, 237-240 (1991).

[2] Ratemaking by agencies other than the Corporation Commission is explicitly excluded from Art. I rulemaking process (75 O.S.Supp. 1992 § 250.3(2)(b), *infra* note 28) and hence must be deemed to fall under the Art. II adjudicative process (75 O.S.1991 §§ 309 et seq.).

[3] For the pertinent terms of the Equal Protection Clause of the 14th Amend., § 1, U.S. Const., see *infra* note 97.

[4] For the pertinent terms of Art. 5, § 46, Okl.Const., see *infra* note 110.

Because the APA expressly exempts the Commission from compliance with the adjudicative process of Art. II (75 O.S.Supp.1993 § 250.4(B)(4)), although Art. I regulates some of the agency's rulemaking aspects, the replacement mechanism in § 316 for disqualified agency decisionmakers is not *statutorily* applicable to members of the Corporation Commission (75 O.S.Supp.1993 § 250.4(A)(2). For the APA's Art. I rulemaking process, see 75 O.S.1991 §§ 250.2 et seq.

The court is clearly in error when it pronounces today that because the Commission's function of public ratemaking is "legislative", it goes unshielded by any form of due process. Labeling ratemaking as legislative or adjudicative should be the beginning of today's inquiry into the reach of protections that are constitutionally due in an individual ratemaking proceeding. Like an ostrich that hides its head in sand to escape the unpleasant consequences of reality, the court today chooses to foist on Oklahoma *dated federal and state jurisprudence* long relegated to antiquarian lore by the more recent expressions from the U.S. Supreme Court.[5] The court's analysis, which begins and ends with reliance on first-generation federal cases, ignores a near-century of the most recent growth in the body of this Nation's constitutional law. That case law unequivocally teaches that ratemaking for application to a single public utility is clothed *with due process safeguards. Among those safeguards is the right to a neutral decisionmaker.*

I cannot accede to today's pronouncement that Commissioner Anthony may not be disqualified because he is acting in a legislative capacity. *The self-caponized court rests its powerlessness on a facial legal fallacy—its ipse dixit*[6] *that a legislator cannot be disqualified.* Our constitution, Art. 5, § 24,[7] clearly calls for legislative disqualification when a conflict of interest should arise. An elected executive official sitting as a legislative decisionmaker in an individual ratemaking proceeding in which he is required to utilize on-the-record adjudicative process should be no less vulnerable to disqualification than his

---

[5] For detailed discussion of the discord between today's analysis and the current federal constitutional jurisprudence, see Part II, *infra.*

[6] *Ipse dixit* is defined by Black's Law Dictionary, p. 743 (5th Ed. 1979), as "a bare assertion resting on the authority of an individual."

[7] For the terms of Art. 5, § 24, Okl.Const., see *infra* note 44.

counterpart in the legislature who is found to have a conflict of interest.

The court's opinion also contravenes this Nation's fundamental charter by imposing a dichotomous division of ratemaking procedures that offends equal protection. While individual ratemaking by an APA-governed agency [8] is explicitly governed by the Art. II's adjudicative process,[9] *it now becomes pure legislation* when the very same process occurs before the Commission. This unequal remedial treatment the court imposes today violates *with like force* the uniformity-of-procedure mandate found in Art. 5, § 46, Okl.Const.[10] When state law is bereft of authority necessary to carry out federal constitutional commands, the U.S. Constitution mandates that this court place the Commission under the (Art. II's) § 316 [11] replacement mechanism of the APA.[12] In the alternative, a statutory replacement mechanism could be read into the provisions of Art. 6, § 13 [13] and Art. 9, § 15, Okl. Const.,[14] construed together with 51 O.S.1991 §§ 8 [15] and 10.[16]

---

[8] An APA-governed agency is one whose adjudicative process must comply with the provisions of Art. II, 75 O.S.1991 §§ 309 et seq.

[9] *Ratemaking is adjudication under the provisions of the APA*, 75 O.S.Supp.1992 § 250.3(2)(b). For the text of § 250.3(2)(b), see *infra* note 28.

[10] For the pertinent terms of Art. 5, § 46, Okl.Const., see *infra* note 110.

[11] For the pertinent terms of 75 O.S.1991 § 316, see *infra* note 96.

[12] For a discussion of the federal fundamental-law replacement mechanism, see Part III, *infra*.

[13] For the pertinent terms of Art. 6, § 13, Okl.Const., see *infra* note 116.

[14] For the pertinent terms of Art. 9, § 15, Okl.Const., see *infra* note 115.

[15] For the pertinent terms of 51 O.S.1991 § 8, see *infra* note 118.

[16] For the pertinent terms of 51 O.S.1991 § 10, see *infra* note 119.

I would declare that Commissioner Anthony is disqualified and that the state and federal fundamental law affords an effective post-recusal mechanism for replacing him as a disqualified Commissioner.

I

RATEMAKING—BEFORE AND AFTER THE BIRTH OF AMERICAN ADMINISTRATIVE LAW

A. *Ratemaking As A "Legislative Function" Before The Birth Of Our Republic And Before The Advent Of State and Federal Administrative Law: The First-Generation Constitutional Teachings Of The U.S. Supreme Court*

The court's characterization of ratemaking as legislative [17] *is of no moment in reaching for the correct answer to today's question.* Ratemaking *was* the responsibility of the British Parliament before our tripartite division of government came into being.[18] In *Munn v. Illinois* [19] the

---

[17] For this notion, the court relies today on Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), and on its *Oklahoma echo* in Henry v. Corporation Com'n, Okl., 825 P.2d 1262, 1266 (1992); State ex rel. Cartwright v. Southwestern Bell Tel. Co., Okl., 662 P.2d 675, 681 (1983); Chickasha Cotton Oil Co. v. Corp. Comm., Okl., 562 P.2d 507, 509-510 (1977); Wiley v. Oklahoma Natural Gas Co., Okl., 429 P.2d 957, 958 (1967); Southern Oil Corporation v. Yale Natural Gas Co., 89 Okl. 121, 214 P. 131, 135 (1923); City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 P. 396, 398 (1921); *see also* Teleco, Inc. v. Southwestern Bell Telephone Co., 392 F.Supp. 692, 698 (W.D.Okl. 1974), *aff'd*, 511 F.2d 949, *cert. denied* 423 U.S. 875, 96 S.Ct. 145, 46 L.Ed.2d 106 (1974).

[18] Before the founding of our Nation, the English Parliament set rates and tariffs by acts. *See* Munn v. Illinois, 94 U.S. 113, 123-124, 24 L.Ed. 77, 83-84 (1877), for a discussion of the extensive British and American antecedents in legislating specific rates for firms "affected with a public interest." *See also* CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES (Public Utilities Reports, Inc., 1988) at 81-85 and 117-123.

[19] *Munn, supra* note 18, 94 U.S. at 125-126, 24 L.Ed. at 84.

U.S. Supreme Court recognized the English institutional scheme and saw *no* necessity to alter it for adaptation to our constitutional order.

The court today *begins and ends* its analysis with the landmark decision in *Prentis v. Atlantic Coast Line* [20] but ignores post-*Prentis* jurisprudential growth. *Prentis*—*Munn's* direct progeny—teaches that ratemaking lies in the legislative realm. This statement means little more than that, as a relic of our British heritage, the *function* is traditionally defined as *lawmaking*. *Munn* and *Prentis* are a first-generation exposition of our constitutional framework. The Oklahoma cases [21] on which the court relies in today's pronouncement *mirror our national law of yore*—the law when *Munn* and its *Prentis* progeny carried the day. The recent reference to *Prentis* in *New Orleans Public Serv. v. Council of New Orleans* [22] has *no* greater significance than that the Court still views *Prentis* as viable precedent on the *essence* of ratemaking function rather than on the *procedural characteristics* of the individual ratemaking process.

While the concept of ratemaking as a legislative function has not been disturbed by the American constitutional order, *post-Prentis jurisprudence has superimposed upon its framework a host of due process protections.*[23] *Participation by a neutral and detached decisionmaker is one of several essential elements of due process which*

---

[20] *Supra* note 17, 211 U.S. at 226-227, 29 S.Ct. at 69.

[21] For Oklahoma decisional law, see *supra* note 17.

[22] In New Orleans Public Serv. v. Council of New Orleans, 491 U.S. 350, 371, 109 S.Ct. 2506, 2520, 105 L.Ed.2d 298 (1989), the Court observes that it has "reaffirmed both the general mode of analysis of *Prentis* . . . and its specific holding that ratemaking is an essentially legislative act."

[23] The Due Process Clause of the 14th Amend., U.S.Const., commands that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." For a discussion of the procedural due process guarantees, see Part II, *infra*.

has been applied to individual ratemaking.[24] The early-day English characterization of ratemaking as legislative [25] no longer *defines the essence* of the process in the context of safeguards extended by our Constitution.[26]

---

[24] *See, e.g.*, Northwestern Bell Tel. v. Stofferahn, 461 N.W.2d 129, 133 (S.D. 1990) (the court applied *the due process neutrality mandate* in an *individual utility rate case*). In Association of Nat. Advertisers, Inc. v. F.T.C., 627 F.2d 1151 (D.C.Cir. 1979), *cert. denied* 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980), the association sought to prohibit the Federal Trade Commission chairman from participating in pending rulemaking proceedings. Although concluding that the commissioner was not disqualified, the court opined that *the parties in a rulemaking setting "have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker." Id.*, at 1174 (emphasis supplied). *See also* Tennessee Cable TV v. Public Service Com'n, 844 S.W.2d 151, 164-166 (Tenn.App. 1992) (the court applied the neutrality mandate in a general ratemaking case).

[25] There is an analogy between the power of the British Parliament over ratemaking and its divorce jurisdiction of yore. Like ratemaking, divorce *a vinculis lay* within the authority of Parliament, which *also* functioned as a court of law. American legislatures succeeded to the Parliament's power despite their different status in the structure of government. SCHWARTZ, *supra* note 1, § 2.27 at 94. After the U.S. Constitution had established a tripartite division of our national government, the Supreme Court did not reallocate ratemaking to make it coincide more closely with our separation-of-powers doctrine. *See in this connection* Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), where the Court noted that the legislative assemblies of the colonies followed the example of Parliament by treating divorce judicature as within their power. The Court has refused to hold that legislatively pronounced divorces offend our concept of separation of powers. Another function performed by Parliament was chartering of corporations. A company could apply to the Crown for a charter of incorporation *or could incorporate by an act of Parliament.* MAX RADIN, ANGLO-AMERICAN LEGAL HISTORY at 482, 513 n.26 (1936). *No one could today contend with any hope of persuasion that because some function lay within Parliament's yesteryear's prerogative, it must now be placed beyond due process protection.*

[26] In United States v. Brewster, 408 U.S. 501, 508, 92 S.Ct. 2531, 2535, 33 L.Ed.2d 507 (1972), the Court made a similar analysis of the Speech or Debate Clause (Art. I, § 6, U.S.Const.). There,

Neither can this historical label *alone determine* the kind of process that is a *public utility's due today.*[27] *By characterizing the Commission's public utility ratemaking as legislative,* in the sense of *Munn* or *Prentis,* and then stopping its analysis, the court today *arrests* our jurisprudence at its turn-of-the-century stage of development, *ignoring entirely a whole century's growth of due process.*

B. *Ratemaking After The Birth Of Administrative Law*

The administrative process of American law distinguishes between *rulemaking* and *adjudication.* A "rule"

---

the Court noted that although the clause's historic roots are in English history, its text must be interpreted, not *against the backdrop of the English system* in which Parliament is not a coordinate branch but the supreme authority ("the highest court in the land"), but rather in light of the American experience as well as in the context of this Nation's *constitutional design. Id.,* 408 U.S. at 508, 92 S.Ct. at 2540.

[27] As Justice Stevens notes in Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 686, 96 S.Ct. 2358, 2368, 49 L.Ed.2d 132 (1976) (Stevens, J., dissenting), when the Court examines "a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a 'legislative' label should not save an otherwise invalid procedure." Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1969), similarly teaches *that historical labels do not define the limits of due process protections.* Just because the English tradition militates in favor of dispensing with a hearing does not necessarily render the practice conformable to *our notions of due process.* In Supreme Court of Virginia v. Consumers Union, etc., 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), the Court shifted its § 1983 (42 U.S.C. § 1983) immunity focus from the *description of the official*—judge, legislator, executive—to the *functional analysis* of what that official was doing when the harm came to be inflicted. If the legislator was hiring and firing, the immunity was that of an executive; but if a legislator or judge was engaged in lawmaking (or the judge in adjudication), absolute immunity applied. *The same kind of analysis is required by the Court's current constitutional jurisprudence for today's assessment of what process in ratemaking is a public utility's due.* Davis v. Passman, *infra* note 57.

is the product of administrative *legislation*.[28] Rulemaking process[29] is hence the administrative counterpart of legislative lawmaking.[30] In contrast, an "order" is the product of administrative *adjudication*.[31] Adjudicative process is the administrative equivalent of a court's judicature.[32]

---

[28] The Oklahoma APA, 75 O.S.Supp.1992 § 250.3(2), defines the term "rule" as:

> "any agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedures or practice requirements of the agency. The term 'rule' includes the amendment or revocation of an effective rule but *does not include*:
>
> a. the issuance, renewal, denial, suspension or revocation or other sanction of an individual specific license.
>
> b. the *approval, disapproval or prescription of rates*. For purposes of this subparagraph, the term 'rates' shall not include fees or charges fixed by an agency for services provided by that agency including but not limited to fees charged for licensing, permitting, inspections or publications. * * *" (Emphasis added.)

[29] "Rulemaking" under the APA (Art. I) "means the process employed by an agency for the formulation of a rule. . . ." 75 O.S.Supp.1992 § 250.3(4).

[30] 75 O.S.Supp.1992 § 250.3(2)(b), *supra* note 28.

[31] An "order" is defined by the APA, 75 O.S.Supp.1992 § 250.3(5), as "all or part of a formal or official decision made by an agency including but not limited to the final agency orders." In the 1981 Model State Administrative Procedures Act the word "order" includes every agency action that determines any of the legal rights, duties, privileges, or immunities of an *identified individual or individuals*. For the difference between "rules" and "orders", see Texas County Irr. & Water v. Okl. Water, Okl., 803 P.2d 1119, 1121 (1991).

[32] In individual proceedings an agency deals with adjudicative, not legislative, facts. For the distinction between legislative and adjudicative facts, see State v. Freeman, Okl., 440 P.2d 744 (1968).

> "Facts to which the law is to be applied in the process of adjudication are called *adjudicative facts*. These are *facts 'about the parties'*. They must be ascertained from formal

To implement the U.S. Supreme Court's second-generation constitutional teachings,[33] the Oklahoma APA *explicitly excised from the Art. I rulemaking rubric the process of prescribing rates.*[34] The Model State Administrative Procedures Act [MSAPA] treats ratemaking determinations of *particular applicability*[35] *as orders* subject to the model act's adjudication provisions. Even the

---

> proof and are to be distinguished from 'legislative facts', or those which are helpful to a court in determining the meaning, effect, content or validity of enactments. *Legislative facts,* which *are ordinarily general in nature,* may be noticed from official source materials, whether or not they have been formally developed on the record in a judicial proceeding."

Id., 440 P.2d at 757-758 (emphasis added). *Individual ratemaking requires finding facts for application to particular business operations.*

[33] For a discussion of the U.S. Supreme Court's *second-generation* constitutional teachings, see Part II, *infra.*

[34] Oklahoma's APA version presently in force *explicitly* classifies ratemaking as adjudication. The terms of 75 O.S.Supp.1992 § 250.3(2)(b), *supra* note 28, provide in part that the "term 'rule' . . . *does not include*: * * * the *approval, disapproval or prescription of rates.* * * *" (Emphasis added.)

[35] *Adapting* the MSAPA to the mid-twentieth-century metamorphosis imposed by the federal constitutional jurisprudence, the Commissioners on Uniform State Laws took ratemaking out of rulemaking in the 1946, 1961 and 1981 versions of the model act. The 1946 MSAPA version *implicitly* included ratemaking in the definition of "contested case," which was *then* defined as a "proceeding before an agency in which the legal rights, duties, or privileges *of specific parties are required by law or constitutional right to be determined after an agency hearing.*" The 1961 version (adopted with modification in Oklahoma), *specifically* included ratemaking in the definition of "contested case"—i.e., "a proceeding, including but not restricted to ratemaking." The 1981 version *implicitly* includes ratemaking (for a single utility) within the definition of "order"—i.e., "an agency action of *particular applicability* that determines the legal rights . . . of one or more specific persons." In contrast, both the 1961 and 1981 versions define the term "rule" as an agency statement *"of general applicability"* that implements, interprets, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency. *See* ARTHUR

federal government—which generally continues to regard ratemaking as rulemaking [36]—has placed *individual ratemaking* into a special category called *on-the-record rulemaking.*[37] This phrase gives recognition to the *new constitutional verity—i.e., that the legislative process of individual ratemaking requires adversarial, trial-type hearings.*[38] *On-the-record rulemaking is now acknowledged*

EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING, § 3.3.1 at 75-76 (1986) (Professor Bonfield served as one of the two reporter-draftsmen for the 1981 MSAPA for the National Conference of Commissioners on Uniform State Laws). At the time of *Prentis* the distinction between *agency ratemaking and agency adjudication* had not yet been crafted. *The changes in the MSAPA give eloquent testimony to the new place individual ratemaking has come to occupy in the post-Prentis administrative remedial regime.*

[36] 5 U.S.C. § 551(4).

[37] 5 U.S.C. §§ 551(4), 553(c). Two types of rulemaking are recognized under the Federal Administrative Procedures Act [FAPA]: *informal* and *formal rulemaking.* 5 U.S.C. §§ 553-557. Informal rulemaking—commonly called notice-and-comment—is governed *only* by the FAPA requirements of notice and opportunity for interested parties to comment or otherwise participate. 5 U.S.C. § 553. *Formal rulemaking takes place when rules must be preceded by a "trial-type" hearing.* 5 U.S.C. §§ 554, 556, 557. A statutory requirement that rules are to be made *on the record after opportunity for an agency hearing* that triggers the process of formal rulemaking—i.e., *rulemaking-upon-a-record.* 5 U.S.C. §§ 556, 557.

[38] Professor Bonfield comments that because some pre-FAPA federal cases treated ratemaking as rulemaking for *certain* purposes, the FAPA classified *all* ratemaking as rulemaking, whether of general or of particular applicability. BONFIELD, *supra* note 35, § 3.3.3(a) at 77-78, citing *Prentis, supra* note 17, 211 U.S. at 226, 29 S.Ct. at 69. Bonfield observes that the FAPA, in combination with the enabling acts of various federal agencies engaged in *individualized ratemaking,* subjected ratemaking of *particular applicability to most of the adjudicative procedures of the FAPA. See, e.g.,* 5 U.S.C. §§ 551(4), 553(c). BONFIELD, § 3.3.3(a) at 77-78. Once a rate is challenged under the federal scheme, the relevant statutes of the federal agencies *require* that the rate be evaluated in a "hearing". *See, e.g.,* (1) Federal Energy Regulatory Commission [FERC], 15 U.S.C. § 717c(e) (1984) (gas pipeline rates) and 16

to be surrounded by a host of due process safeguards.[39]

A recent commentator *captured the essence of ratemaking* in this eloquent distillate: Ratemaking, while legislative in character,[40]

U.S.C. § 824d(e) (electric); (2) Federal Communications Commission [FCC], 47 U.S.C.A. § 204(a) (Cum.Supp.1993); (3) Interstate Commerce Commission [ICC], 49 U.S.C.A. § 10704(a) (railroad) and 49 U.S.C. § 10708(a)(2) (motor carriers); (4) Civil Aeronautics Board [CAB], 49 U.S.C. § 1482(g). The basic format of a rate investigation hearing is that of a traditional adversary hearing. *See, e.g.,* (1) CAB—14 C.F.R. §§ 302.24, .500-.508; (2) FPC—18 C.F.R. §§ 1b.1-.20; (3) FCC—47 C.F.R. § 1.201-.364 (1992). *See generally,* Morgan, *Toward A Revised Strategy For Ratemaking,* 1978 Law Forum 21.

[39] Professor Davis notes that *"for all practical purposes,* rules 'made on the record' *are the equivalent of rules 'made through trial procedure.'"* (Emphasis supplied.) KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE, § 6.3 at 455 (1978). One commentator observes that "an inference that protected objectivity in *some* measure is required [by the FAPA] could be drawn from statutes requiring use of trial-type procedures to a greater or lesser degree." Peter L. Strauss, Disqualifications of Decisional Officials in Rulemaking, 80 Colum.L.Rev. 990, 1048 (1980).

[40] In Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915), Justice Holmes (the author of *Prentis, supra* note 17) explains that "due process" safeguards are *not triggered* when "a rule of conduct applies to *more than a few people* [because] it is impracticable that everyone should have a direct voice in its adoption." (Emphasis added). When "a relatively small number of persons was concerned," Justice Holmes notes, "due process" must be afforded. *Id.* at 142-43. *See also,* Dent v. State of West Virginia, 129 U.S. 114, 124, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889) (legislation comports with due process if, among other things, *"it be general in its operation upon the subjects to which it relates. . . ."*) (Emphasis added). Justice Blackmun, concurring in O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), used the rationale in *Bi-Metallic* and *Dent* to support his conclusion that 180 patients in a nursing home were not deprived of "due process". He also made clear that "the case for *due process protection grows stronger as the identity of the persons affected by the government choice becomes clearer; and the case becomes stronger still as the*

"is normally *particular in applicability* since it involves the fixing of prices to be charged by utilities or carriers. When an agency fixes the rates charged by an electric utility, where there is only one company whose rates are being fixed, the impact on that company is *virtually that of a judicial decision,* and it has a *due process right to be heard.* Regardless of its theoretical legislative nature, the proceeding is an adversary one, with the company and the agency as opposing parties who can best present their sides in a trial-type format." [41]

---

precise nature of the effect on each individual comes more determinately within the decision maker's purview." Id., at 447 U.S. at 800-01, 100 S.Ct. at 2483, quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7 at 503-504 (1978) (emphasis added).

[41] SCHWARTZ, *supra* note 1, § 5.8 at 239 (1991) (emphasis added). But SCHWARTZ goes on to say that the same is not true *when rates are general* rather than *particular in applicability. Id.* at 239. Federal courts have noted *the difference* between a *legislative* deprivation that requires no due process and one that is *judicial* which mandates application of the due process safeguards. *See* Richardson v. Town of Eastover, 922 F.2d 1152 (4th Cir. 1991) ("While a legislative enactment is one adopted *generally for all citizens in a particular classification* [citing as an example *Bi-Metallic, supra* note 40], when a rule adopted for general application *applies only to a small number of persons, its characterization as legislation becomes suspect." Id.,* at 1158, (emphasis added)); County Line Joint Venture v. Grand Prairie, Texas, 839 F.2d 1142 (5th Cir. 1988) ("Conduct of a municipal body is likely to be *deemed legislative when an elected group, such as a city council, makes a general zoning* decision which applies to *a large group of interests.* Conversely, a municipal body's action may be more likely termed *adjudicative if an appointed group such as a zoning board, makes specific decisions regarding a specific piece of property." Id.,* at 1144, (emphasis added)). For the same rationale, see Hoffman v. City of Warwick, 909 F.2d 608, 619-21 (1st Cir. 1990); United States v. LULAC, 793 F.2d 636, 648 (5th Cir. 1986); Buford v. Holladay, 791 F.Supp. 635, 643-44 (S.D. Miss. 1992). Leading commentators also agree that for administrative agencies which possess both legislative and judicial powers, "due process" safeguards are invoked when a small class is affected by the agency action *despite the characterization given to that action*

In sum, rules are agency directives of *general applicability* which are designed *to apply across the board to all regulated entities.* Ratemaking, although historically termed nonadjudicative, generally calls for *particularized applicability and trial-type hearings.* With the post-*Prentis* march of due process, today's *individual ratemaking*—gradually transformed for conformity to the adjudicative process—no longer fits under the *general rubric of lawmaking (or rulemaking).*[42] The present-day acceptance of individual ratemaking as "adjudication" or as "on-the-record rulemaking" is but current recognition—by *both* the federal and state administrative law systems—that ratemaking of particularized applicability has indeed become *sui generis*—a *genre* of legislation that bears procedural characteristics which implicate due process. The essence of business profitability, the extent of capital investment, and the return rate for each utility, are *elements of proof,* all of which call for *a different analysis* and for a different fact finding process (for individual ratemaking) from that of *ordinary* general rulemaking. *It is for this reason that individual ratemaking inquiry*

---

by the agency. See R. ROTUNDA & J. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 17.8, pp. 646 (2d Ed. 1992); TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10.7, pp. 667 (2d Ed. 1988).

[42] At the time of *Prentis, supra* note 17, the Court had yet to craft a distinction between administrative *rulemaking* (as lawmaking) and administrative *adjudication.* Citing *Prentis,* Professor Davis notes that in the early 1900's the Court "was unsoundly trying to determine the appropriate procedure" in agency proceedings by characterizing them as either legislative or judicial. DAVIS, *supra* note 39 at 322. He observes that the "move in the thinking of both judges and administrators is away from the idea that adjudication calls for one procedure and that rulemaking calls for another procedure." Courts *"now tend to look to the particular task that an agency is performing in an adjudication or in rulemaking in determining what is the required procedure." Id., at* 324 (emphasis added).

must be surrounded with the full panoply of due process guarantees.[43]

C. *A Self-Caponized Court Rests Its Powerlessness On A Facial Legal Fallacy*

It is plain legal *non sequitur* to say that Commissioner Anthony cannot be disqualified because he is acting in a legislative capacity. The concept of legislative disqualification is intrinsic in our fundamental law. In the context of a legislator's conflict of interest, the terms of Art. 5, § 24, Okl.Const.,[44] mandate that an affected member abstain from voting in any matter, proposed or pending. This constitutional disqualification is judicially enforceable.[45] A legislator found to be disqualified within the meaning of § 24 could be compelled to desist from voting. *An elected executive official sitting as a legislative decisionmaker in an individual ratemaking proceeding*

---

[43] In United States v. Florida East Coast Railway Co., 410 U.S. 224, 245, 93 S.Ct. 810, 821, 35 L.Ed.2d 223 (1973), an Interstate Commerce Commission ratemaking case, the Court held that when agency action is directed at "a very small number of persons [who are] exceptionally affected," it constitutes adjudication and due process attaches, but when the same agency action is "applicable across the board" to all utility companies it is rulemaking in its purest form with no due process implications. *Id. See also,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978); SCHWARTZ, *supra* note 1, § 5.9, at 241-242.

[44] The terms of Art. 5, § 24, Okl.Const., are:

> "A member of the Legislature, who has a personal or private interest in any measure or bill, proposed or pending before the Legislature, shall disclose the fact to the House of which he is a member, and shall not vote thereon."

[45] Although there is no Oklahoma authority construing Art. 5, § 24, Okl.Const., it is apparent from the jurisprudence of other states (with similar or virtually identical provisions) that this constitutional mandate is judicially enforceable. *See, e.g.,* Kremer v. Barbieri, 411 A.2d 558, 561 (Pa. 1980); Opinion of the Justices No. 317, 474 So.2d 700, 702 (Ala. 1985).

should be no less vulnerable to disqualification than his counterpart in the legislature when the latter is found to have a conflict of interest.

II

TODAY'S PRONOUNCEMENT CONTRAVENES STATE AND FEDERAL DUE PROCESS NORMS BY WITHDRAWING FROM THE COMMISSION'S INDIVIDUAL RATEMAKING AN ESSENTIAL ELEMENT OF DUE PROCESS—THAT OF A NEUTRAL AND DETACHED DECISIONMAKER

A. *Both Legislative And Executive Functions Are In Some Aspects Governed By Various Forms Of Due Process*

This Nation's constitutional jurisprudence teaches that, when the State seeks to affect a *protected liberty or property interest,* due process *applies not just in courts but to the other functions of government* as well.[46]

(1). *The Executive Department.* A prisoner has a due process right to "an adversary executive hearing" before revocation of parole [47] or probation,[48] rescission of "good-time credits" [49] and before an involuntary transfer to a

---

[46] In Mooney v. Holohan, 294 U.S. 103, 113, 55 S.Ct. 340, 342, 79 L.Ed.2d 791 (1935), the Court observes that the 14th Amendment *"governs any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers."* (Emphasis supplied.)

[47] Once a state grants a prisoner conditional liberty dependent on the observance of special parole restrictions, due process protections attach in proceedings to revoke that liberty interest. Morrissey v. Brewer, 408 U.S. 471, 487-489, 92 S.Ct. 2593, 2603-2604, 33 L.Ed.2d 484 (1972).

[48] Gagnon v. Scarpelli, 411 U.S. 778, 791, 93 S.Ct. 1756, 1764, 36 L.Ed.2d 656 (1973).

[49] Wolff v. McDonnell, 418 U.S. 539, 554, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935 (1974); Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); Ponte v. Real, 471 U.S. 491, 498-499, 105 S.Ct. 2192, 2197, 85 L.Ed.2d 553 (1985).

state mental hospital.[50] Due process also attaches in other areas of governmental regulation: food stamp reductions;[51] termination of welfare benefits;[52] exclusion of a permanent resident alien who is attempting to reenter the United States;[53] a public job termination;[54] and license revocation.[55] The due process guarantee may be violated by unfairness or corruption of officers in the performance of administrative functions.[56]

---

[50] Vitek v. Jones, 445 U.S. 480, 487-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980).

[51] Atkins v. Parker, 472 U.S. 115, 128, 105 S.Ct. 2520, 2528, 86 L.Ed.2d 81 (1985).

[52] Goldberg v. Kelly, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970).

[53] Landon v. Plasencia, 459 U.S. 21, 34, 103 S.Ct. 321, 330, 74 L.Ed.2d 21 (1982).

[54] Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) (the due process challenges of discharged Central Intelligence Agency employee are reviewable).

[55] In Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), the Court upheld the lower court's finding that members of the state optometry board had sufficient pecuniary interest in reducing competition to disqualify them from participating in the license revocation hearings. The Court held that an optician licensing board whose members were drawn wholly from one wing (self-employed practitioners) of the occupation could not itself adjudicate unprofessional conduct charges brought against the other wing (commercially or non-self-employed practitioners). The Court based this holding on the premise that the monetary gain to the self-employed practitioners would unfairly infect their decisional processes.

[56] Norris v. State of Alabama, 294 U.S. 587, 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074 (1935); *Mooney, supra* note 46, 294 U.S. at 112-113, 55 S.Ct. at 341-342. The Court has recognized that administrative officers, when executing the provisions of a statute dealing with the liberty of persons, have no right to disregard the fundamental principles that inhere in due process of law. Kaoru Yamataya v. Fisher, 189 U.S. 86, 99-100, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903).

(2). *The Legislative Department.* Legislative action is not beyond the reach of due process if the implicated interests mandate that certain safeguards be accorded. The anti-discrimination component of the 5th Amendment applies to a congressman's hiring and firing practices.[57] Due process has also found its way into congressional hearings where the Congress or a state legislature attempts to hold one of its members in contempt and to certify that member for trial in the courts.[58]

B. *The Due Process Mandate For Neutral Decisionmakers Governs A Host Of Proceedings Before The Executive And Legislative Organs of Government*

Due process of law fundamentally requires a fair hearing before a fair tribunal.[59] Fairness against governmen-

---

[57] Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). *Davis* teaches that the Due Process Clause of the 5th Amendment gives congressional employees the right to be free from official discrimination. The Court held that a woman discharged from employment by a congressman because of her gender has standing to bring an action against him.

[58] Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966) (the Georgia House of Representatives acted unconstitutionally when it excluded Julian Bond because of his statements criticizing the federal government's policy in Vietnam); Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (the U.S. House of Representatives acted unconstitutionally when it effectively expelled Adam Clayton Powell by a majority vote because of charges that he had misappropriated public funds and abused the process of the New York courts). *See also* Miller v. Town of Hull, Mass., 878 F.2d 523 (1st Cir. 1989) (the town board of selectmen violated the due process rights of members of the town redevelopment authority by removing them because of a position they took with respect to a housing project for the elderly); Kucinich v. Forbes, 432 F.Supp. 1101 (N.D.Ohio 1977) (Councilman Kucinich had been punished for the exercise of his right of free speech when the Cleveland City Council suspended him on the charge that he had slandered the council president in a statement on the floor of that body).

[59] For the pertinent terms of the Due Process Clause of the 14th Amend., U.S.Const., see *supra* note 23. No matter how complete

tal deprivation of an individual's property or liberty interest is ensured by procedural safeguards [60] when proper notice and opportunity to be heard are afforded.[61] *One*

---

the panoply of procedural devices which protect a particular liberty or property interest, due process requires that those procedures be neutrally applied. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). "Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator. Whether or not it can be proven that a particular decisionmaker allows her personal interests to sway her resolution of a dispute, the perception-of-fairness value demands that she be enjoined from deciding the case if she has some identifiable *potential* bias. Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors." M. H. Redish and L. C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 483 (1986).

[60] Due process includes several procedural guarantees: (1) adequate notice of the charges or basis for government action; (2) a neutral decisionmaker; (3) an opportunity to make an oral presentation to the decisionmaker; (4) an opportunity to present evidence or witnesses to the decisionmaker; (5) a chance to confront and cross examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decisionmaker; and (7) a decision based on the record with a statement of reasons for the decision. Additionally, there are six other procedural safeguards which tend to appear only in connection with criminal trials or formal judicial process of some type. Those are: (1) the right to compulsory process of witnesses; (2) a right to pre-trial discovery of evidence; (3) a public hearing; (4) a transcript of the proceedings; (5) a jury trial; and (6) a burden of proof on the government greater than a preponderance of the evidence standard. *See* ROTUNDA & NOWAK, *supra* note 41, § 17.8, at pp. 644-45; Henry J. Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267, 1279-1292 (1975).

[61] *Goldberg, supra* note 52. Our due process clause, Art. 2, § 7, Okl.Const., has a definitional sweep that is co-extensive with its federal counterpart. The terms of Art. 2, § 7, Okl.Const., are: "No person shall be deprived of life, liberty, or property, without due process of law." Messenger v. Messenger, Okl., 827 P.2d 865, 872 (1992); Fair Sch. Finance Coun. of Okla. v. State, Okl., 746 P.2d 1135, 1148 n.48 (1987); Matter of Rich, Okl., 604 P.2d 1248, 1250-

of the integral elements of due process is an individual's right to be heard by a neutral and detached decisionmaker.[62] *That element is not constitutionally reserved for exclusive application to adjudicative proceedings. The neutrality mandate extends not only to judges but also to agency decisionmakers.*[63] The neutral examiner concept

---

1251 (1979); McKeever Drilling Co. v. Egbert, 170 Okl. 259, 40 P.2d 32, 35 (1935). *See* Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972), citing Baldwin v. Hale, 68 U.S. 223, 17 L.Ed. 531 (1864), and Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

[62] Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927), arose out of a conviction in a mayor's court for violation of state prohibition laws. In addition to his regular income. the mayor-judge shared in the fees and costs levied against convicted violators. The Court held that due process is violated when a decision is made by "a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against" the defendant. Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972), dealt with traffic convictions in a mayor's court. The mayor-judge was responsible for village finances; and the mayor's court, through fines, forfeitures, costs and fees, supplied a major part of the village's revenue. The system was challenged because it denied the defendant a trial before a disinterested and impartial judicial officer, contrary to the guarantee of due process.

[63] *Administrative decisionmakers must be as neutral and detached as a judge is called upon to be by the applicable standards of federal due process.* In *Gibson, supra* note 55, 411 U.S. at 579, 93 S.Ct. at 1698, the Court states:

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey v. Ohio [*supra*, note 62] . . . . And Ward v. Village of Monroeville [*supra* note 62], indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that '[*m*]*ost of the law concerning disqualification* because of interest *applies with equal force to . . . administrative adjudicators.*' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." (Emphasis added.)

Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). In Friedman v. Rogers, 440 U.S. 1, 18, 99 S.Ct. 887,

is deeply engrained in Anglo-American jurisprudence. It came into the fabric of our fundamental law long before the Warren era [64] and has been consistently enforced *sans* aberrational departure.[65] Due process, which is a flexible concept calling for such procedural protection as the particular situation demands, is fashioned first by considering what private interest is to be affected by the agency action and then by what protection must be accorded that interest.[66] An agency decisionmaker sitting in an ad-

---

898, 59 L.Ed.2d 100 (1979), the Court notes that Rogers, an optometrist, has "a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board [of Optometry]." *Id.*, citing *Gibson, supra* note 55. Due process will be applied before the Corporation Commission. Agencies not governed by the APA's Art. II adjudicative process, 75 O.S.1991 §§ 309 et seq., are nonetheless bound by those portions of that Article which embrace due process concepts. C.F. Braun & Co. v. Corporation Commission, Okl., 609 P.2d 1268, 1273-1274 (1980); Teleco, Inc. v. Corporation Com'n, Okl., 653 P.2d 209, 214 (1982); Harry R. Carlile Trust v. Cotton Petroleum, Okl., 732 P.2d 438, 442-443 n. 21 (1987); Amoco Production v. Corp. Com'n of Okl., Okl.App., 751 P.2d 203, 207 (1986); State ex rel. Henry v. Southwestern Bell, Okl., 825 P.2d 1305, 1317 (1992); Lincoln Bank and Trust v. Tax Com'n, Okl., 827 P.2d 1314, 1319 (1992); *see also* Art. 9, § 19, Okl.Const.; Monson v. State ex rel. Okl. Corp. Com'n, Okl., 673 P.2d 839, 842 (1983).

[64] *Tumey, supra* note 62.

[65] *Ward, supra* note 62; Coolidge v. New Hampshire, 403 U.S. 443, 449-453, 92 S.Ct. 2022, 29 L.Ed.2d 564 (1971), teaches that the neutrality element of due process is as applicable to adjudication by a nonjudicial tribunal as it is to the adjudicative process of a court. *Coolidge* required a neutral person for a *nonadversarial ex parte proceeding to issue a search warrant.* The New Hampshire attorney general was not considered a neutral and detached officer *for this purpose.*

[66] *Due process protects liberty and property interests regardless of which governmental official seeks to affect is adversely. Morrissey, supra* note 47, 408 U.S. at 481, 92 S.Ct. at 2600; Mitchell v. W.T. Grant Company, 416 U.S. 600, 610, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406 (1974); Schweiker v. McClure, 456 U.S. 188, 195, 102 S.Ct. 1665, 1670, 72 L.Ed.2d 1 (1982).

versarial contest may neither (1) have a personal financial interest or be a direct competitor[67] with a person who stands before the tribunal or (2) have been the target of abuse or harsh criticism from such a person.[68]

The due process neutrality mandate has been imposed on execuitve agency action which affects (1) welfare recipients;[69] (2) the involuntary transfer of a prisoner to a mental hospital;[70] (3) the revocation of probation;[71]

---

[67] In *Friedman, supra* note 63, 440 U.S. at 17-20, 99 S.Ct. at 898-99, the Court made clear that in professional disciplinary proceedings a person has a right to a fair and impartial hearing board; *Gibson, supra* note 55 at 1698; *Ward, supra* note 62; *Tumey, supra* note 62.

[68] Taylor v. Hayes, 418 U.S. 488, 501-03, 94 S.Ct. 2697, 2704-06, 41 L.Ed.2d 897 (1974); Pickering v. Board of Education, 391 U.S. 563, 578-79 n. 2, 88 S.Ct. 1731, 1740 n.2, 20 L.Ed.2d 811 (1968). Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S.Ct. 499, 505, 27 L.Ed.2d 532 (1971), teaches more eloquently than any other case *that even an offending or abusive litigant does not lose the constitutional claim to a neutral decisionmaker.* There, the Court observed that "[n]o one so cruelly slandered [as the presiding judge] is likely to maintain that calm detachment necessary for fair adjudication". *Id.*

[69] *Goldberg, supra* note 52. In *Goldberg* the Court held that welfare recipients were entitled to full evidentiary hearings before their rights to federal funds could be terminated. Although the recipients' main concern was to establish a procedural right to a full evidentiary hearing, the court noted that *within that right was a right to a fair and impartial decisionmaker. Id.*, 397 U.S. at 271, 90 S.Ct. at 1022.

[70] In *Vitek, supra* note 50, the Court held that an involuntary transfer of a prisoner to a mental hospital implicated a protected liberty interest and that *due process was not satisfied* by the mere certification of the need for such treatment by a state-designated physician. The Court found that the transfer constituted a deprivation of liberty both because state statutes at issue gave rise to a legitimate expectation on the part of the prisoner. The Court reiterated that due process required (1) notice, (2) time for the prisoner to prepare his argument, (3) a hearing where the prisoner has the opportunity to be heard in person, to present evidence and

(4) the revocation of a convict's "good time" credits;[72] and (5) the revocation of parole.[73] *Although each situation calls for differing levels of due process protection and scrutiny, the neutrality strand is present in all of these instances.* The command also extends to *legislative decisionmakers.* A legislative enactment cannot meet the standards of neutrality when its terms authorize a narrow and biased segment of the community to decide certain zoning permits.[74]

---

witnesses, and to cross examine state witnesses; (4) *an independent decisionmaker,* and (5) *a written statement by the decisionmaker.*

[71] In *Gagnon, supra* note 48, the Court held that because probation revocation (like parole revocation) does result in a loss of liberty, a probationer (like a parolee) is entitled to a preliminary and a final revocation hearing, *under the conditions specified in Morrissey* (*supra* note 47). *Id.*, 411 U.S. at 782. 93 S.Ct. at 1760.

[72] *Wolff, supra* note 49. In *Wolff* an inmate sought the restoration of "good time" credits. The Court recognized that "prison disciplinary proceedings are not part of a criminal prosecution, and the *full panoply of rights due a defendant in such proceedings does not apply.*" *Id.*, 418 U.S. at 556, 94 S.Ct. at 2975. *But the Court opined that several due process safeguards, including the right to an impartial committee to decide disciplinary matters, i.e., revocation of "good time" credits, did apply. Id.*, 418 U.S. at 571, 94 S.Ct. at 2982.

[73] *Morrissey, supra* note 47. In *Morrissey* the Court held that an individual released from prison on parole need not receive the "full panoply" of due process safeguards, but was entitled to some of these protections including the right to have his revocation hearing conducted by someone other than the parole officer that makes the recommendation for revoking his parole. *Among the minimum due process requirements which is the parolee's due, the Court opined, is "a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers". Id.*, 408 U.S. at 489, 92 S. Ct. at 2604.

[74] In Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), the Court struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of owners of two-thirds of the property within 400 feet

Ratemaking for application to a *single* public utility calls for adversary hearings and for application of contested adjudicative facts to the governing norms of statutory and constitutional law. *These attributes combine to clothe this form of ratemaking with characteristics to which the federal constitution attaches due process protections. The safeguards include the right to neutral decisionmakers.* To withdraw them from public utilities would clearly contravene federal due process.

C. *Southwestern Bell Telephone Company Has A Federal Constitutional Claim To A Neutral And Detached Tribunal*

Petitioner Southwestern Bell Telephone Company seeks this court's command that would disqualify Commissioner Anthony from sitting in Corporation Commission proceeding PUD-260 [75] as well as in *all* pending and future SWB cases. SWB asserts that Commissioner Anthony's public statement of October 2, 1992,[76] considered

---

of the proposed facility. *See* Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912). In *Washington* and *Eubank*, *supra*, a limited number of people, with obvious biases against devaluation of their individual properties, were authorized by legislation to make determinations for individuals regarding zoning. *A judge who has a financial position adverse to a party before the tribunal is in the same ineligibility category as the unauthorized lawmakers in the cited cases. See also,* R. ROTUNDA & NOWAK, *supra* note 41, § 17.8 at 658.

[75] PUD-260, a utility rate-setting proceeding, had begun below as an investigation by the director of the agency's public utility division into the effect of the federal Tax Reform Act of 1986 upon Oklahoma utilities. The initial Commission order was affirmed in part and reversed in part and the cause was remanded for further proceedings. *Henry, supra* note 63. *The present controversy over Commissioner Anthony's disqualification arose after the earlier remand.*

[76] According to his public announcement on file herein, in which he conceded making ex parte statements to certain officials of SWB, he had been serving for nearly four years as informant and inves-

together with a motion he filed in the case to compel SWB to produce certain notes and documents,[77] make

---

tigator of federal-law violations ascribed to certain Commission-regulated utilities. Commissioner Anthony made the following statement on October 2, 1992.

> "As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to Southwestern Bell case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with Southwestern Bell and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.
>
> As an additional matter which has at least partial bearing on the PUD 260 case or other Southwestern Bell cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner in 1989, individuals associated with regulated companies have offered me cash or inducements.
>
> With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.
>
> Furthermore, I will report that more than a year ago I separately advised a Southwestern Bell senior corporate officer and then later a senior corporate attorney with Southwestern Bell of the conduct of persons associated with their firm.
>
> I have delayed making this announcement for as long as possible in order to avoid compromising the Federal investigation. I have been advised a limited announcement pursuant to my commission responsibilities should have no adverse consequence on the FBI's investigation. I come forward at this time because the parties to cases at the Corporation Commission have rights which must be protected."

[77] The notes sought by Commissioner Anthony's motion *relate to conversations he had with a SWB senior corporate officer and SWB senior corporate lawyer about the conduct of persons asso-*

him ineligible to sit in an individual ratemaking case as a neutral decisionmaker.

Commissioner Anthony's participation in this rate case is constitutionally impermissible for two reasons: (a) he had several ex parte conversations with different representatives of SWB and *most importantly* (b) one who in the same case or in interconnected matters assists in the prosecution of company officials cannot act as a neutral decisionmaker in a related individual ratemaking case.[78] Because the principle of impartiality that governs the *cold neutrality and detachment* of judges must be applied with equal force to decisionmakers in individual ratemaking proceedings,[79] I would declare today that Commissioner Anthony is disqualified in PUD-260 and that his lack of detachment calls for his replacement by the command of federal fundamental law (Part III, *infra*) or in the alternative under the mandate of the state statutory law (Part IV, *infra*). I would also hold that Anthony's disqualification applies solely to this case and should not affect the

---

ciated with their firm, which is believed to be *pertinent to the rate case at hand (PUD-260).*

[78] *Northwestern Bell Tel., supra* note 24, 461 N.W.2d at 133 (where the court applied *the due process neutrality mandate* in an individual utility rate case); *see also* State ex rel. Okl. Bar Ass'n v. McNaughton, Okl., 719 P.2d 1279, 1281 (1986) (a lawyer was publicly reprimanded for improperly accepting representation of an adult defendant charged with lewd molestation of a minor and also serving as counsel for the underage victim, her minor sister and their mother in matters connected with his client's prosecution); Tweedy v. Oklahoma Bar Ass'n, Okl., 624 P.2d 1049, 1053 (1981); Adan Haji Jama v. The King, Judicial Committee of the Privy Council (1948) (reported in M. MERRILL, CASES AND MATERIALS ON ADMINISTRATIVE LAW, Vol. 1, p. 173 (1950).

[79] *Gibson, supra* note 55; *Friedman, supra* note 63. There can be no legal basis for withholding from individual utility ratemaking hearings the Due Process Clause's protection conferred by *Gibson, supra* note 55. The *Gibson* teachings apply *with the same force to adversary individual utility ratemaking hearings as they do to any run-of-the-mill adjudications.*

post-decisional proceedings authorized by this court's February 9, 1993 order in *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission.*[80] That case, unlike PUD-260, has been decided and is now on appeal. I would save for another day the questions (1) whether today's challenge would also disqualify Anthony from participating *in any other pending or future cases in which SWB may be interested or a party* and (2) whether an evidentiary proceeding might be required to determine Anthony's disqualification in utility-rate cases other than PUD-260.

III

WHEN A COMMISSIONER VOLUNTARILY RECUSES OR IS COMMANDED TO DISQUALIFY *IN AN INDIVIDUAL RATEMAKING PROCEEDING*, FEDERAL FUNDAMENTAL LAW COMMANDS THIS COURT TO PLACE THE COMMISSION UNDER THE APA REPLACEMENT MECHANISM

The Corporation Commission consists of three commissioners who have the exclusive authority to regulate public service corporations.[81] The concurrence of two commissioners is required to decide any question.[82] Even

---

[80] Southwestern Bell Telephone Company v. Oklahoma Corporation Commission, No. 80,333 (consolidated with Nos. 80,334, 80,340, 80,342 and 80,345). In that appeal we afforded SWB the opportunity (a) to elicit below *after-acquired evidence*, if any there be, that would tend to show Commissioner Anthony was disqualified at the time he sat as a decision-maker in PUD-662, a case different from PUD-260, and (b) to supplement the record in this court by including in it a transcript of the disqualification proceedings to be conducted pursuant to the authority conferred by our order.

[81] Art. 9, § 15, *infra* note 115, and § 18a, *infra* note 82, Okl. Const.

[82] The terms of Art. 9, § 18a, Okl.Const., are:

> "* * * A majority of said Commission shall constitute a quorum, and the concurrence of the majority of said Commission shall be necessary to decide any question."

though the State Constitution allows the Commission to sit with a quorum of two commissioners,[83] to do so in a complex rate case might be inefficient because in the event of a tie vote proceedings would be unduly prolonged.

Oklahoma jurisprudence does not afford a mechanism for breaking a tie when the Corporation Commission decisionmakers are evenly divided. In original proceedings brought here over the last decade this court has *twice* come to grips with quests for the recusal of a Corporation Commission member.[84] In *ETSI* [85] the court disqualified Commissioner Townsend, declaring that members of an agency sitting in an adjudicative capacity must meet the criteria of neutral and detached decisionmakers. In *Cooperative Ginners'* the court assumed original jurisdiction but refused to disqualify Commissioners Anthony and Watts.[86] Neither *ETSI* nor *Cooperative Ginners'* was an *individual ratemaking case.*

---

[83] Art. 9, § 18a, Okl.Const., *supra* note 82.

[84] ETSI Pipeline et al v. Townsend, Sup.Ct. No. 58,707 (original jurisdiction assumed and writ granted *by unpublished order* of September 9, 1982) and Cooperative Ginners' Association of Oklahoma et al v. Anthony and Watts, Sup. Ct. No. 78,510 (original jurisdiction assumed and writ of mandamus denied *by unpublished order* of January 28, 1992).

[85] *ETSI, supra* note 84. The September 9, 1982 order states:

> "Writ granted directing the Honorable James Townsend, member of the Corporation Commission, respondent herein, to certify his recusal in Cause No. 27470, on the docket of the Corporation Commission, and to forward a certified copy thereof to the Governor of the State of Oklahoma. *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 [1973]."

No mention is made of Townsend's recusal in the published decision of the case in which he was disqualified. Missouri-Kansas-Texas Railroad Co. v. State, Okl., 712 P.2d 40 (1986). *After Commissioner Townsend had been disqualified by an order of this court, the Governor either declined or was never asked to fill the vacancy by a pro hac vice appointment. ETSI* was decided by the concurrence of two elected commissioners who sat in the case.

[86] The *unpublished order* in *Cooperative Ginners', supra* note 84, states: "Original jurisdiction is assumed. Application for writ of mandamus requiring Commissioners Bob Anthony and J.C. Watts,

The Rule of Necessity

If the law—either state or federal—were bereft of mechanism for replacing a disqualified Corporation Commissioner, a "rule of necessity" [87] would permit the challenged agency member to sit in the case. There is no need *in this case* to invoke the common-law rule of necessity because federal fundamental law affords an effective post-recusal mechanism for replacing a disqualified Commissioner.

The Commission's individual ratemaking proceedings [88] and those conducted by the APA-governed agencies [89] comprise but a single class which is entitled to equal procedural treatment. Today's holding—which regards the Commission's public utility ratemaking as legislative, but leaves the same proceedings before APA-governed agencies with all the safeguards of adjudication process—creates a constitutionally impermissible adjective-law

---

Jr., to recuse is denied. * * *" There, I joined in *not* disqualifying Commissioners Anthony and Watts. It was *then* my opinion that the "rule of necessity", *infra* note 87, was applicable to Corporation Commission members. *Id.* (Opala, C.J. dissenting from order of January 28, 1992). Since then I have changed my position, now taking the view articulated today in Parts III and IV of this opinion that the law *does indeed provide a mechanism for replacing a disqualified commissioner.*

[87] The rule of necessity rests on a well-established common-law principle *that, regardless of bias, judges have a duty to sit if they alone have the power to decide the matter before them.* United States v. Will, 449 U.S. 200, 214-216, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980). *Where a mechanism is in existence for replacing a disqualified tribunal member, the successfully challenged decision-maker must step aside.* Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936).

[88] The Commission is exempted from compliance with the Art. II adjudicative process by 75 O.S.Supp. 1993 § 250.4(B)(4), but is required to comply with some portions of the APA's Art. I rulemaking provisions. 75 O.S.Supp. 1993 § 250.4(A)(2).

[89] For the definition of an APA-governed agency, see *supra* note 8.

dichotomy.[90] *Procedure for individual ratemaking cases before the Commission and that for the identical function exercised by an APA-governed agency must be the same.* The *post-recusal replacement mechanism* must also be the same. The command for procedural uniformity comes both from the state[91] and federal fundamental law.[92] *Groppi v. Wisconsin*[93] teaches that *conformity to con-*

---

[90] Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 762-763, 15 L.Ed.2d 620 (1966), which teaches that when the state singles out some litigants for a less advantageous remedial treatment than that which is afforded others in like proceedings, equal protection is violated unless the distinction bears a rational nexus to some legitimate state goal. Humphrey v. Cady, 405 U.S. 504, 508-512, 92 S.Ct. 1048, 1051-1054, 31 L.Ed.2d 394 (1972); Foucha v. Louisiana, 504 U.S. ——, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992); Cascio v. State ex rel. Dept. of Pub. Safety, Okl., 686 P.2d 282, 284 (1984).

[91] *See* discussion of the uniformity-of-procedure mandate of Art. 5, 46 Okl.Const., in Part III(B), *infra.*

[92] *See* the discussion of the federal constitution's equal protection commands in Part III(A), *infra.*

[93] 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971). Groppi was a Catholic priest who was charged with resisting arrest. When he was brought to trial he objected to venue on constitutional grounds. The state court ruled that it was powerless to change the trial's venue since state law prevented a change of venue in misdemeanor cases. The U.S. Supreme Court held the state law unconstitutional since it denied the defendant the opportunity to obtain a change of venue when necessary for a fair trial. Faced with a similar constitutional challenge to Nebraska's venue law in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the Court, citing *Groppi, supra,* observed "that state laws restricting venue must on occasion *yield to the constitutional requirement* that the State afford a fair trial." *Id.,* 427 U.S. at 563, 96 S.Ct. at 2805 n. 7 (emphasis added). *See also* Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), where an indigent defendant sought a free transcript in order to perfect his appeal. The Illinois Supreme Court rejected his request because a state court rule provided indigents with transcripts only in felony cases. The U.S. Supreme Court held the rule unconstitutional, stating that the "distinction

stitutional procedure is compellable even when there is a lack of authorizing provisions in state law. In *Groppi* the Court held unconstitutional a state law which *permitted a change of venue for felony but not for misdemeanor trials.* When state law does not provide the authority necessary to carry out federal constitutional commands resort may be had to the U.S. Constitution to accomplish the constitutionally mandated objective. Just as the Commission, though not an Art. II APA-governed agency,[94] must conform its inquiries to due process standards,[95] so also must its individual ratemaking proceedings be governed by compliance with equal protection. I would hence hold, for reasons to be explained in Part III, *infra*, that *when a commissioner voluntarily recuses or is commanded to disqualify, state and federal fundamental law authorizes this court to place the Commission pro tanto under the APA's (Art. II) §316 replacement mechanism.*[96]

---

between felony and nonfelony offenses drawn by Rule 607(b) [an Illinois State rule] can no more satisfy the requirements of the Fourteenth Amendment than could the like distinction in the Wisconsin law, held invalid in *Groppi* . . . . The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case." *Id.*, 400 U.S. at 195-196, 92 S.Ct. at 415.

[94] For definition of an Art. II APA-governed agency, see *supra* note 8.

[95] *Braun, supra* note 63, 609 P.2d at 1273-1274; *Cotton Petroleum, supra* note 63, 732 P.2d at 442-443; *Amoco, supra* note 63, 751 P.2d at 207; *Henry, supra* note 63, 825 P.2d at 1317; *Lincoln, supra* note 63, 827 P.2d at 1319.

[96] The pertinent terms of 75 O.S.1991 § 316, are:

> "A hearing examiner or agency member shall withdraw from any individual proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impar-

A. *The Equal Protection Clause's Mandate For A Uniform Post-Recusal Replacement Mechanism*

This court has a duty to obey the Federal Constitution's equal protection mandate [97] for a uniform procedure [98] and provide a post-recusal replacement mechanism. Although states are free to enlarge the basic freedoms guaranteed by the federal constitution,[99] they

---

tial hearing cannot be accorded. The issue shall be determined promptly by the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. *Upon the disqualification of a member of an agency, the Governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding.* In further action, after the disqualification of a member of an agency, the provisions of Section 11 of this act [§ 311] shall apply." (Emphasis added.)

[97] The Equal Protection Clause of the 14th Amend., § 1, U.S. Const., commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 505 U.S. ——, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992).

[98] *Baxstrom, supra* note 90, 383 U.S. at 111, 86 S.Ct. at 762-763; *Humphrey, supra* note 90, 405 U.S. at 508-512, 92 S.Ct. at 1051-1053; *Foucha, supra* note 90, 504 U.S. at ——, 112 S.Ct. at 1785; *Cascio, supra* note 90, 686 P.2d at 284.

[99] U.S. Supreme Court jurisprudence is not dispositive of rights guaranteed by state constitutional provisions. States are free to interpret their own due process and equal protection clauses to afford safeguards beyond those granted by the federal constitution, even when the state and federal constitutions are similarly or identically phrased. *See* Michigan v. Long, 463 U.S. 1032, 1037-1042, 103 S.Ct. 3469, 3474-3477, 77 L.Ed.2d 1201, 1212-1215 (1983); Cooper v. State of California, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967); Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975); *see also Messenger, supra* note 61, 827 P.2d at 873 n.42; *Fair Sch. Finance Coun., supra* note 61, 746 P.2d at 1147 n.46; Turner v. City of Lawton, Okl., 733 P.2d 375, 380 (1987). *See generally* Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489, 499 (1977); ROTUNDA & NOWAK, *supra* note 41, § 1.6(c) at 31-32.

may not create artificial boundaries for individual ratemaking hearings that fall within an identical class. To meet equal protection standards *all* persons need not receive identical treatment, but the *distinctive features of a classification must have some relevance to the purpose for which it has been created.*[100] *A classification is not to be measured by whether it discriminates, but rather by whether it discriminates impermissibly or invidiously* [101] —i.e., whether the difference in treatment between the legislative and adjudicative ratesetting remedies *rationally* furthers a legitimate state interest.[102] *The Commission's individual ratemaking proceedings* [103] *and those conducted by the agencies governed by Art. II of the APA* [104] *comprise but a single class which is entitled to absolutely equal procedural treatment.*

---

[100] The Equal Protection Clause is violated *when some but not all regulated businesses* in an entire class are excluded from protection of the adjudication safeguards afforded by the APA. *Baxstrom, supra* note 90; *Cady, supra* note 90, *Cascio, supra* note 90; Wilson v. Foster, Okl., 595 P.2d 1329, 1332 (1979).

[101] *See, e.g., Cascio, supra* note 90, 686 P.2d at 284; Texas Oklahoma Exp. v. Sorenson, Okl., 652 P.2d 285, 291 (1982).

[102] "[U]nless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categories on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification *rationally further* a legitimate state interest." *Nordlinger, supra* note 97, 505 U.S. at ——, 112 S.Ct. at 2331-2332 (emphasis added), citing City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439-441, 105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313 (1985), and New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

[103] The Commission is expressly excluded from compliance with the APA (Art. II) hearing provisions. 75 O.S.Supp. 1993 § 250.4 (B)(4).

[104] Art. II APA-governed agencies (*supra* note 8) have the authority to set rates in individual proceedings. *See, e.g.*, the State Board for Property and Casualty Rates (36 O.S. 1991 §§ 341.1, 900.1 et seq.; State v. Okl. State Bd. For Property, Okl., 731 P.2d 394 (1987)).

The goal of ratemaking—whether it be by an Art. II APA-governed agency [105] or by the Commission—is to give the affected parties a fair return upon the fair value of dedicated property. When the ratemaking decision is apt to affect *particular* rights and obligations, the Art. II adjudicative process affords those who are to be affected the right to a trial-type hearing with the safeguards of procedural due process.[106] Because the very same goal that applies to agency ratemaking also governs public utility ratemaking by the Commission, I find *no rational* basis for creating a different and less protective procedural classification for *particularized ratemaking before the Commission.*[107] Section 316 of the APA (Art. II) explicitly provides that upon the disqualification of an APA-governed agency member, the Governor shall immediately appoint a "member pro tem[pore] to sit in place of the disqualified member in that proceeding." [108] *Oklahoma cannot, without violating the Equal Protection Clause,*

---

[105] APA-governed agency ratemaking, which is explicitly excluded from Art. I rulemaking process by 75 O.S.Supp. 1992 § 250.3(2)(b) (*supra* note 28), is governed by the Art. II adjudicative process (75 O.S.1991 §§ 309 et seq.).

[106] The same due process protections are afforded under the federal administrative system. American Airlines v. Civil Aeronautics Board, 359 F.2d 624, 631 (D.C.Cir. 1966), *cert. denied,* 385 U.S. 843, 87 S.Ct. 73 (1966), *teaches that if the administrative process is directed at particular persons—even if it be termed rulemaking—the persons to be affected must be given the* same hearing rights as in proceedings that are clearly of an adjudicative nature.

[107] For the Equal Protection Clause of the 14th Amend., § 1, U.S.Const., see *supra* note 97. The Oklahoma Constitution does not have an equal protection clause similar to that found in its federal counterpart, but this court has identified a functional equivalent of that clause in the anti-discrimination component of our State Constitution's due process section. Art. 2, § 7, Okl.Const. ("No person shall be deprived of life, liberty, or property, without due process of law."). *See Fair Sch. Finance Coun., supra* note 61, 746 P.2d at 1148 n.48.

[108] For the pertinent terms of 75 O.S.1991 § 316, see *supra* note 96.

withdraw today from public utility ratemaking those essential characteristics of due process—i.e., a decision-maker's neutrality [109]*—which attach to ratemaking before the APA-governed agencies. I would hence hold that by the command of the Federal Constitution's Equal Protection Clause the § 316 provisions of the APA's Art. II replacement mechanism for a disqualified agency member apply to public utility ratemaking before the Commission.*

B. *The Uniformity-Of-Procedure Mandate of Art. 5, § 46, Okl.Const., Requires That Individual Ratemaking Procedure In The APA-governed Agencies And Before The Commission Not Be Materially Different*

Art. 5, § 46, Okl.Const.,[110] prohibits the passage of local or special laws regulating judicial proceedings or inquiry before the courts, commissioners *or other tribunals.*[111] Today's pronouncement violates that section.

---

[109] *Gibson, supra* note 55, 411 U.S. at 579, 93 S.Ct. at 1698, and its progeny.

[110] The pertinent terms of Art. 5, § 46, Okl.Const., are:

"The Legislature shall not . . . pass any . . . special law . . .

* * *

Regulating the *practice* . . . in judicial proceeding or inquiry before the courts . . . or *other tribunals.*" (Emphasis added).

[111] Maule v. Independent School Dist. No. 9, Okl., 714 P.2d 198, 203-204 (1986); Reynolds v. Porter, Okl., 760 P.2d 816, 822 (1988); Great Plains Federal S & L v. Dabney, Okl., 846 P.2d 1088, 1095-1096 (1993) (Opala, J., concurring). The word "tribunal," as used in § 46, includes every agency that sits in an adjudicative capacity. Our fundamental law explicitly charges the Corporation Commission with the responsibility of a "court of record". Art. 9, § 19, Okl. Const. When the Commission acts in an adversary setting in which it is called upon to apply the governing principles of law to the facts in dispute, it sits as a court of record and functions in an adjudicative capacity. *Monson, supra* note 63, 673 P.2d at 842; Hair v. Oklahoma Corp. Com'n, Okl., 740 P.2d 134, 141 (1987).

It creates an impermissible dichotomy in procedure. It leaves ratemaking firmly under the rubric of Art. II's adjudicative process for APA-governed agencies but treats *the very same inquiry* before the Commission as "legislative." Because of that dichotomous division, litigants before APA-governed agencies would be entitled to neutral decisionmakers whereas those participating in like proceedings before the Commission might stand subjected to biased hearing examiners. The procedural uniformity mandate of Art. 5, § 46 dictates that litigants in individual ratemaking proceedings before both APA-governed agencies and the Commission be afforded the benefit of the Art. II § 316 [112] replacement mechanism.

Because the Legislature has committed itself to one form of procedure for individual ratemaking under Art. II of the APA, this court cannot by judicial fiat *mandate a different concept of procedure* for the Commission. Our own jurisprudence, no less than the Legislature's enactments, must faithfully conform to the state fundamental law's prohibition against non-uniform laws on prohibited subjects.[113] Procedure *in like proceedings* must be uniform. Art. 5, § 46, Okl.Const.[114]

---

[112] For the pertinent terms of 75 O.S.1991 § 316, see *supra* note 96.

[113] *Reynolds, supra* note 111, 760 P.2d at 822; although directed to the Legislature, Art. 5, § 46, Okl.Const., *supra* note 110, is no less binding on the courts. Special laws are those which single out less than an entire class of similarly affected persons or things for different treatment. A special law is one that rests on a false or deficient classification. *"It creates preference and establishes inequity."* Barrett v. Board of Com'rs of Tulsa County, 185 Okl. 111, 930 P.2d 442, 446 (1939); *Maule, supra* note 111, 714 P.2d at 203 n. 30; *Dabney, supra* note 111, 846 P.2d at 1096 n.12.

[114] For the pertinent terms of Art. 5, § 46, Okl. Const., see *supra* note 110.

IV.

A REPLACEMENT MECHANISM COULD BE FAIRLY READ INTO THE STATE CONSTITUTIONAL AND STATUTORY PROCEDURAL REGIME

A. *When A Commissioner Voluntarily Recuses Or Is Commanded To Disqualify, There Is A "Vacancy" For The Case Within The Meaning Of 51 O.S.1991 § 8 (Subdiv. 2), Which The Governor May Fill By A Pro Hac Vice Appointment*

While under state law there is no explicit replacement mechanism for a disqualified Commissioner, one could be read into our constitutional and statutory procedural regime. The terms of Art. 9, § 15, Okl.Const.,[115] expressly authorize the Governor to fill vacancies in the office of a Corporation Commissioner. Generally, when a vacancy occurs in a public office, and the law is silent as to the method for filling it, the terms of Art. 6, § 13, Okl.Const.,[116] expressly confer the power of appointment upon the Governor. Absent a constitutional prohibition, the Legislature may define the contingencies or events

---

[115] The pertinent terms of Art. 9, § 15, Okl.Const., are:

"A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: * * * In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term."

[116] The pertinent terms of Art. 6, § 13, Okl.Const., are:

"The Governor shall commission all officers not otherwise commissioned by law. * * * When any office shall become vacant, he shall, unless otherwise provided by law, appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed, and qualified according to law."

that will cause an office to become vacant.[117] The terms of 51 O.S. 1191 § 8 [118] enumerate several occasions that result in a vacancy. By the terms of 51 O.S.1991 § 10,[119] these offices may then be filled by the Governor. The office of Corporation Commissioner, if left vacant by the death, resignation, removal or disqualification of the incumbent, is among those state offices which, in the exercise of his § 10 powers, the Governor may fill by appointment for the unexpired term.

Subdiv. 2 of § 8 provides that an office becomes vacant upon the incumbent's "failure to qualify as required by

---

[117] The constitutional provisions that confer on the Governor the power to fill vacancies in the office of Corporation Commissioner, Art. 9, § 15, Okl.Const., *supra* note 115, as well as in other state offices, Art. 6, § 13, Okl.Const., *supra* note 116, do not expressly or by implication prohibit the Legislature from determining *when a vacancy may occur*. The "Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing." *Fair Sch. Finance Coun., supra* note 61, 746 P.2d at 1149; Tate v. Logan, Okl., 362 P.2d 670, 674 (1961); Miller v. Childers, 107 Okl. 57, 238 P. 204, 206 (1924).

[118] The terms of 51 O.S.1991 § 8 provide in pertinent part:

"Every office shall become vacant on the happening of any one of the following events before the expiration of the term of such office:

* * *

"Second. His removal from office or *failure to qualify as required by law.*

* * *

The fact by reason whereof the vacancy arises *shall be determined by the authority authorized to fill such vacancy.*" (Emphasis added.)

[119] The terms of 51 O.S.1991 § 10 provide in pertinent part:

"(a) *All vacancies in state offices,* except in offices of the members of the Legislature, members of the House of Representatives from Oklahoma in the Congress of the United States of America and members of the Senate of the United States of America, *shall be filled by appointment by the Governor.* * * *" (Emphasis added.)

law." [120] Although this eventuality is commonly invocable when a public officer fails to do what the law declares necessary before the duties of an office may be assumed,[121] I would hold that Subdiv. 2 is broad enough to create a *pro hac vice* vacancy. In short, when an administrative decisionmaker *fails* to qualify to sit in a case, a *pro hac vice* vacancy results.[122]

Auxliary Post-Recusal Procedure For Filling A Pro Hac Vice Vacancy

In the exercise of his § 10 authority, the Governor is empowered to declare that a vacancy, which may be filled by appointment, has arisen as a result of one of the eventualities enumerated in § 8.[123] While this procedure is possible of effective implementation when a *permanent* vacancy may occur, it is not likely to put the

---

[120] For the text of 51 O.S.1991 § 8 (Subdiv. 2), see *supra* note 118.

[121] *See, e.g.*, State ex rel. Berge v. Lansing, 64 N.W. 1104, 1109-1110 (Neb. 1895) (the official bond was not timely presented); Brannon v. Perkey, 31 S.E.2d 898, 902-903 (W.Va. 1944) (the oath was not timely administered).

[122] The precise precedent for our decision in this case is not easily found. This is so because *before* the 1973 *Gibson* teachings, *supra* note 55, neutrality of administrative decisionmakers had not become a constitutional command. In short, the rule of impartiality, which has always governed the judiciary, did not apply to agency decisionmakers. *Today's mandate for detachment and neutrality is of a federal constitutional dimension.* Recusal cases may hence come to us from the agencies with greater frequency than ever before.

One judicial commentator points out that "English judges and scholars consider that we [Americans] have simply gone mad" in our tendency to judicialize administrative procedures. *Thus, it is all the more relevant that one of the two elements of "natural justice" which British courts hold essential in all adjudicatory contexts is the right to an unbiased administrative decisionmaker. See Friendly, supra* note 60 at 1269.

[123] *See* 51 O.S.1991 § 8, *supra* note 118.

Governor on notice in case of a *pro hac vice* vacancy occasioned by a recused or disqualified Commissioner. No prescribed statutory procedure is found for filling a temporary § 8 vacancy for *a single case*. The Governor neither scans, nor has the duty to monitor, cases in process of adjudication. I would hence depart from the § 10 regime to fashion a *different parallel procedure* for *pro hac vice* appointments to the office of Corporation Commissioner.

When a Commissioner's disqualification creates a *pro hac vice* vacancy, the Commission could either notify the Governor and request that the vacancy be filled immediately, or the Commission may wait until a deadlock has occurred before requesting an appointment. The post-recusal mechanism I would craft, which merely supplements the § 10 procedure, will promote a smooth and efficient processing of agency cases. I would caution that a request at *an advanced stage of proceedings* may occasion additional delay. A *pro hac vice* Commissioner, appointed while the case is moving toward its completion, would doubtless need additional time to study the record or may require that some of the evidence be re-presented.

SUMMARY

Today's self-caponizing decisional process closes its eyes (1) to this century's growth of federal due process protections that surround on-the-record or individual ratemaking as well as (2) to the mid-twentieth century "incorporation doctrine" [124] which transformed most of the *Bill of Rights' values into commands enforceable against every nonconforming state government action—legislative, judicial or executive.* Ratemaking for application to a single public utility is individual ratemaking for "special application." *It is clothed with due process safeguards.*

---

[124] Adamson v. California, 332 U.S. 46, 68, 67 S.Ct. 1672, 1684, 91 L.Ed. 1903 (1947) (Black, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 646-648, 81 S.Ct. 1684, 1686-1687, 6 L.Ed.2d 1081 (1961).

Among these is the right to *a neutral decisionmaker.* Oklahoma has recognized (in 75 O.S.Supp. 1992 § 250.3 (2)(b)) this category of contests as a class distinct from general "rulemaking" and placed them under *the strictures of Art. II agency adjudication process.*

Oklahoma *may not today* (1) without violating the *Federal Constitution's Due Process Clause,* withdraw from the Commission's ratemaking for a single public utility the critical component of a decisionmaker's detachment and neutrality; (2) without violating the Fourteenth Amendment's *Equal Protection Clause,* withdraw from the Commission's individual ratemaking the same due process safeguards which must be afforded in like proceedings before APA-governed agencies; and (3) without offending the *uniformity-of-procedure mandate* in Art. 5, § 46, Okl.Const., withhold from individual public utility ratemaking by the Commission the procedural attributes of adjudication which are ascribed to that proceeding by the provisions of § 250.3(2)(b). I would hold today that in PUD-260 the *Corporation Commission* cannot meet the federal due process standards of neutrality and detachment.[125] I would hence declare that Commissioner Anthony is disqualified and that his lack of detachment calls for his replacement. The replacement mechanism should be drawn either from § 316 of the APA or from the provisions of 51 O.S. 1991 § 8.

My view of Commissioner Anthony's status does not reflect adversely on his conduct of voluntarily assisting

---

[125] Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 827-828, 106 S.Ct. 1580, 1588, 89 L.Ed.2d 823 (1986). Commissioner Anthony's exclusion seems critical to SWB's fate in this case. Though personal bias of one lawmaker in a large legislative body might be viewed as diffused by the multitude of others in the assembly's membership, it is different before a three-member tribunal where there is but a very thin insulation against one commissioner whose neutrality status may be viewed as even marginally clouded. See *Association of Nat. Advertisers, supra* note 24, 627 F.2d at 1193 (MacKinnon, J., dissenting in part and concurring in part).

in the efforts to expose what he doubtless perceived as corrupt ratemaking practices; rather, it appeals for absolute obedience to the mandatory federal constitutional safeguards for individual ratemaking contests, which so very clearly protect public utilities' property interests from impermissible state action. Anthony's disqualification need not be feared as a *triumph* of the forces of darkness and as *punishment* for his virtuous deeds. *Far from it.* Ordering Anthony to step aside is to reaffirm the people's *faith* in the reality of their passionate commitment to *evenhanded* governmental decisionmaking (no matter who, or what interests, may have tipped the scales) and to make the Constitution's rule of fundamental fairness the *ultimate victor* in today's struggle between competing political values.

APPENDIX B

[Filed May 25, 1993]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 80,579

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

ORIGINAL PROCEEDING FOR A PREROGATIVE WRIT

Petitioner's quest to declare Commissioner Anthony disqualified from sitting in Cause No. PUD-260.

ORIGINAL JURISDICTION ASSUMED; WRIT GRANTED

OPALA, J.

In this original proceeding the two issues to be decided are: (1) Is Corporation Commissioner Anthony [Anthony] disqualified from participation in Cause No. PUD-260 [1] on the agency docket? and if so, (2) Does a "va-

---

[1] PUD-260, a utility rate-setting proceeding, had begun below as an investigation by the director of the agency's public utility division into the effect of the federal Tax Reform Act of 1986 upon Oklahoma utilities. The initial Commission order was affirmed in part and reversed in part and the cause was remanded for further proceedings. State ex rel. Henry v. Southwestern Bell, Okl., 825 P.2d 1305 (1992). ***The present controversy over Commissioner Anthony's disqualification arose after the earlier remand.***

cancy" arise—within the meaning of 51 O.S. 1991 § 8[2] —upon an incumbent Commissioner's disqualification, which may be filled by a gubernatorial appointment *pro hac vice*?[3] We answer both questions in the affirmative.

Petitioner Southwestern Bell Telephone Company [SWB] seeks this court's command that would disqualify Commissioner Anthony from sitting in Corporation Commission [Commission] proceeding PUD-260[4] as well as in *all* pending and future SWB cases. SWB asserts that Anthony's public statement of October 2, 1992,[5] consid-

---

[2] For the terms of 51 O.S.1991 § 8, see *infra* note 24.

[3] Freely translated from Latin, the phrase "vacancy *pro hac vice*" means a vacancy *for* the case in progress. Black's Law Dictionary gives a similar definition for the phrase *pro hac vice*: "*For* this turn; *for* this one particular occasion. A lawyer may be admitted to practice in a jurisdiction [in which he is not licensed] *for* a particular case only." (Emphasis supplied.) *Id.*, at 1212 (6th Ed. 1990).

[4] *See supra* note 1.

[5] Commissioner Anthony made the following statement on October 2, 1992:

> "As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to Southwestern Bell case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with Southwestern Bell and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.
>
> As an additional matter which has at least partial bearing on the PUD 260 case or other Southwestern Bell cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner

ered together with a motion he filed in the case to compel SWB to produce certain notes and documents,[6] make it manifestly impossible for him to resolve in a neutral and detached manner the controversy which affects SWB's interests.

I

SWB HAS A FEDERAL CONSTITUTIONAL CLAIM TO A NEUTRAL AND DETACHED DECISION-MAKER

Administrative adjudicators must be as neutral and detached as a judge is called upon to be by the applicable standards of federal due process.[7] "[A] fair trial in a fair

---

in 1989, individuals associated with regulated companies have offered me cash or inducements.

With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.

Furthermore, I will report that more than a year ago I separately advised a Southwestern Bell senior corporate officer and then later a senior corporate attorney with Southwestern Bell of the conduct of persons associated with their firm.

I have delayed making this announcement for as long as possible in order to avoid compromising the Federal investigation. I have been advised a limited announcement pursuant to my commission responsibilities should have no adverse conseqence on the FBI's investigation. I come forward at this time because the parties to cases at the Corporation Commission have rights which must be protected."

[6] The notes sought by Anthony's motion *relate to conversations he had with a SWB senior corporate officer and SWB senior corporate lawyer about the conduct of persons associated with their firm*, which is believed to be *pertinent to the rate case at hand (PUB-260)*.

[7] The Due Process Clause of the 14th Amend., § 1, U.S.Const., commands that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ."

tribunal is a basic requirement of due process." [8] Our due process clause, Art. 2, § 7, Okl.Const.,[9] has a definitional sweep that is co-extensive with its federal counterpart.[10]

In Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973), the Court states:

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). And Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that '*[m]ost of the law concerning disqualification* because of interest *applies with equal force to . . . administrative adjudicators.*' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." (Emphasis added.)

In Friedman v. Rogers, 440 U.S. 1, 18, 99 S.Ct. 887, 898, 59 L.Ed.2d 100 (1979), the court notes that Rogers, an optometrist, has "a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board [of Optometry]." *Id.*, citing *Gibson v. Berryhill, supra.*

[8] In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). "Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator. Whether or not it can be proven that a particular decisionmaker allows her personal interests to sway her resolution of a dispute, the perception-of-fairness value demands that she be enjoined from deciding the case if she has some identifiable *potential* bias. Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors." M. H. Redish and L. C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.Journal 455, 483 (1986).

[9] The terms of Art. 2, § 7, Okl.Const., are:
"No person shall be deprived of life, liberty, or property, without due process of law."

[10] Messenger v. Messenger, Okl., 827 P.2d 865, 872 (1992); Fair School Finance Council v. State, Okl., 746 P.2d 1135, 1148 n.48 (1987); Matter of Rich, Okl., 604 P.2d 1248, 1250-1251 (1979);

This case presents more than mere allegations of bias and prejudice. At the core here is the question whether *Anthony's actions* reflect adversely on his posture as a neutral and detached adjudicator.[11] According to his public announcement on file herein, in which he conceded making ex parte statements to certain officials of SWB, he had been serving for nearly four years as informant and investigator of federal-law violations ascribed to certain Commission-regulated utilities.[12] Because the principle of impartiality that governs the *cold neutrality and detachment* of judges applies with equal force to administrative adjudicators,[13] we must declare that Commissioner Anthony is disqualified in PUD-260.

McKeever Drilling Co. v. Egbert, 170 Okl. 259, 40 P.2d 32, 35 (1935). *See* Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972), citing Baldwin v. Hale, 68 U.S. 223, 17 L.Ed. 531 (1864) and Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

[11] Our fundamental law explicitly charges the Corporation Commission with the responsibility of a "court of record". Art. 9, § 19, Okl. Const. When the Commission acts in an adversary setting in which it is called upon to apply the governing principles of law to the facts in dispute, it sits as a court of record and functions in an adjudicative capacity. Monson v. State ex rel. Okl. Corp. Com'n, Okl., 673 P.2d 839, 842 (1983); Hair v. Oklahoma Corp. Com'n, Okl., 740 P.2d 134, 141 (1987).

[12] For the text of the October 2, 1992 statement, see *supra* note 5.

[13] *Gibson, supra* note 7; *Friedman, supra* note 7.

When setting rates the Corporation Commission acts in a legislative capacity. Wiley v. Oklahoma Natural Gas Company, Okl., 429 P.2d 957, 958 (1967); Chickasha Cotton Oil Co. v. Corp. Comm., Okl., 562 P.2d 507, 509 (1977); Application of Valliant Tel. Co., Okl., 656 P.2d 273, 275 (1982); Turpen v. Oklahoma Corp. Com'n, Okl., 769 P.2d 1309, 1317 (1989).

There can be no legal basis for withholding from utility-rate hearings the Due Process protection conferred by *Gibson, supra* note 7. The *Gibson* teachings apply *with the same force to adversary utility-rate hearings as they do to any run-of-the-mill administrative adjudications.*

Today's disqualification, which applies solely to the case in which it was pressed (PUD-260), does not affect the post-decisional proceedings authorized by this court's February 9, 1993 order in *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission.*[14] That case, unlike PUD-260, has been decided and is now on appeal. We save for another day the questions (1) whether SWB's successful challenge today also disqualifies Anthony from participating *in any other pending or future cases in which SWB may be interested or a party* and (2) whether an evidentiary proceeding might be required to determine Anthony's disqualification in utility-rate cases other than PUD-260.

II

WHEN A COMMISSIONER VOLUNTARILY RECUSES OR IS COMMANDED TO DISQUALIFY, THERE IS A "VACANCY" *FOR THE CASE* WITHIN THE MEANING OF 51 O.S.1991 § 8 (SUBDIV. 2), WHICH THE GOVERNOR MAY FILL BY A *PRO HAC VICE* APPOINTMENT

The Corporation Commission consists of three commissioners who have the exclusive authority to regulate public service corporations.[15] The concurrence of two commissioners is required to decide any question.[16] Even

---

[14] Southwestern Bell Telephone Company v. Oklahoma Corporation Commission, No. 80,333 (consolidated with Nos. 80,334, 80,340, 80,342 and 80,345). In that appeal we afforded SWB the opportunity (a) to elicit below *after-acquired evidence,* if any there be, that would tend to show Commissioner Anthony was disqualified at the time he sat as a decision-maker in PUD-662, a case different from PUD-260, and (b) to supplement the record in this court by including in it a transcript of the disqualification proceedings to be conducted pursuant to the authority conferred by our order.

[15] Art. 9, §§ 15, 18, Okl.Const.

[16] The terms of Art. 9, § 18a, Okl. Const., are:

though the State constitution allows the Commission to sit with a quorum of two commissioners,[17] to do so in a complex rate case might be inefficient since in the event of a tie vote proceedings would be unduly prolonged.

Oklahoma jurisprudence does not afford a mechanism for breaking a tie when the Corporation Commission adjudicators are evenly divided. In original proceedings brought here over the last decade this court has *twice* come to grips with quests for the recusal of a Corporation Commission member.[18] In *ETSI* [19] the court disqualified Commissioner Townsend, declaring that members of an agency sitting in an adjudicative capacity must meet the criteria of neutral and detached decision-makers. In *Cooperative Ginners'* the court assumed original jurisdic-

---

"* * * A majority of said Commission shall constitute a quorum, and the concurrence of the majority of said Commission shall be necessary to decide any question."

[17] Art. 9, § 18a, Okl. Const., *supra* note 16.

[18] ETSI Pipeline Project et al v. Townsend, Sup. Ct. No. 58,707 (original jurisdiction assumed and writ granted *by unpublished order* of September 9, 1982) and Cooperative Ginners' Association of Oklahoma et al v. Anthony and Watts, Sup.Ct.No. 78,510 (original jurisdiction assumed and writ of mandamus denied *by unpublished order* of January 28, 1992).

[19] *ETSI*, *supra* note 18. The September 9, 1982 order states:

"Writ granted directing the Honorable James Townsend, member of the Corporation Commission, respondent herein, to certify his recusal in Cause No. 27470, on the docket of the Corporation Commission, and to forward a certified copy thereof to the Governor of the State of Oklahoma. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 [1973]."

No mention is made of Townsend's recusal in the published decision of the case in which he was disqualified. Missouri-Kansas-Texas Railroad Co. v. State, Okl., 712 P.2d 40 (1986). *After Commissioner Townsend had been disqualified by an order of this court, the Governor either declined or was never asked to fill the vacancy by a pro hac vice appointment.* ETSI was decided by the concurrence of two elected commissioners who sat in the case.

tion but refused to disqualify Commissioners Anthony and Watts.[20]

If the law were to provide *no* mechanism for replacing a disqualified Corporation Commissioner, a "rule of necessity"[21] would permit the challenged agency member to sit in the case. In this case there is no need to invoke this common-law rule of necessity because, as we conclude today, the provisions of Art. 6, § 13[22] and Art. 9, § 15, Okl.Const.,[23] as well as those of 51 O.S.1991 §§ 8 and

---

[20] The *unpublished order* in *Cooperative Ginners', supra* note 18, states: "Original jurisdiction is assumed. Application for writ of mandamus requiring Commissioners Bob Anthony and J.C. Watts, Jr., to recuse is denied. * * *" There, I joined in *not* disqualifying Commissioners Anthony and Watts. It was *then* my opinion that the "rule of necessity", *infra* note 21, was applicable to Corporation Commission members. *Id.* (Opala, C.J. dissenting from order of January 28, 1992). Since then I have changed my position, now taking the view articulated today in Part II of this opinion that the law *does indeed provide a mechanism for replacing a disqualified commissioner.*

[21] The rule of necessity rests on a well-established common-law principle *that, regardless of bias, judges have a duty to sit if they alone have the power to decide the matter before them.* United States v. Will, 449 U.S. 200, 214-216, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980). *Where a mechanism is in existence for replacing a disqualified tribunal member, the successfully challenged decison-maker must step aside.* Brinkley v. Hassig, 83 F.2d. 351, 357 (10th Cir. 1936).

[22] The pertinent terms of Art. 6, § 13, Okl.Const., are:

"The Governor shall commission all officers not otherwise commissioned by law. * * * When any office shall become vacant, he shall, unless otherwise provided by law, appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed, and qualified according to law."

[23] The pertinent terms of Art. 9, § 15, Okl.Const., are:

"A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: * * * In case of a vacancy in said office, the

10,[24] construed together, *afford an effective post-recusal mechanism for replacing a disqualified Commissioner.*

The Constitutional and Statutory Procedural Regime

The terms of Art. 9, § 15, Okl.Const.,[25] expressly authorize the Governor to fill vacancies in the office of a Corporation Commissioner. Generally, when a vacancy occurs in a public office, and the law is silent as to the method for filling it, the terms of Art. 6, § 13, Okl. Const.,[26] expressly confer the power of appointment upon the Governor. Absent a constitutional prohibition, the Legislature may define the contingencies or events that

---

Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term."

[24] The terms of 51 O.S.1991 § 8 provide in pertinent part:

"Every office shall become vacant on the happening of any one of the following events before the expiration of the term of such office:

* * *

"Second. His removal from office or *failure to qualify as required by law.*

* * *

The fact by reason whereof the vacancy arises *shall be determined by the authority authorized to fill such vacancy.*" (Emphasis added.)

The terms of 51 O.S.1991 § 10 provide in pertinent part:

"(a) *All vacancies in state offices,* except in offices of the members of the Legislature, members of the House of Representatives from Oklahoma in the Congress of the United States of America and members of the Senate of the United States of America, *shall be filled by appointment by the Governor.* * * *" (Emphasis added.)

[25] For the pertinent terms of Art. 9, § 15, Okl.Const., see *supra* note 23.

[26] For the pertinent terms of Art. 6, § 13, Okl.Const., see *supra* note 22.

will cause an office to become vacant.[27] The terms of O.S. 1991 § 8 [28] enumerate several occasions that result in a vacancy. By the terms of 51 O.S.1991 § 10,[29] these offices may then be filled by the Governor. The office of Corporation Commissioner, if left vacant by the death, resignation, removal or disqualification of the incumbent, is among those state offices which, in the exercise of his § 10 powers, the Governor may fill by appointment for the unexpired term.

Subdiv. 2 of § 8 provides that an office becomes vacant upon the incumbent's "failure to qualify as required by law." [30] Although this eventuality is commonly invocable when a public officer fails to do what the law declares necessary before the duties of an office can be assumed,[31] we hold today that Subdiv. 2 is broad enough to precipitate a *pro hac vice* vacancy. In short, when an administrative decision-maker *fails* to qualify to sit in a case, a *pro hac vice* vacancy is created.[32]

---

[27] The constitutional provisions that confer on the Governor the power to fill vacancies in the office of Corporation Commissioner, Art. 9, § 15, Okl.Const., *supra* note 23, as well as in other state offices, Art. 6, § 13, Okl.Const., *supra* note 22, do not expressly or by implication prohibit the Legislature from determining *when a vacancy may occur*. The "Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing." *Fair School Finance Council, supra* note 10 at 1149; Tate v. Logan, Okl., 362 P.2d 670, 674 (1961); Miller v. Childers, 107 Okl. 57, 238 P. 204, 206 (1924).

[28] For the text of 51 O.S.1991 § 8 (Subdiv. 2), see *supra* note 24.

[29] For the text of 51 O.S.1991 § 10, see *supra* note 24.

[30] For the text of 51 O.S.1991 § 8 (Subdiv. 2), see *supra* note 24.

[31] *See, e.g.*, State ex rel. Berge v. Lansing, 64 N.W. 1104, 1109-1110 (Neb. 1895) (the official bond was not timely presented); Brannon v. Perkey, 31 S.E.2d 898, 902-903 (W.Va 1944) (the oath was not timely administered).

[32] The precise precedent for our decision in this case is not easily found. This is so because *before* the 1973 *Gibson* teach-

Auxiliary Post-Recusal Procedure For Filling A Pro Hac Vice Vacancy

In the exercise of his § 10 authority, the Governor is empowered to declare that a vacancy, which may be filled by appointment, has arisen as a result of one of the eventualities enumerated in § 8.[33] While this procedure is possible of effective implementation when a *permanent* vacancy may occur, it is not likely to put the Governor on notice in case of a *pro hac vice* vacancy in the office of a recused Commissioner. No prescribed statutory procedure is found for filling a temporary § 8 vacancy for *a single case*. The Governor neither scans, nor has the duty to monitor, cases in process of adjudication. We hence must depart today from the § 10 regime to fashion a *different parallel procedure* for *pro hac vice* appointments to the office of Corporation Commissioner.

When a Commissioner's disqualification creates a *pro hac vice* vacancy, the Commission may either notify the Governor and request that the vacancy be filled immediately, or the Commission may wait until a deadlock occurs before requesting an appointment. The post-recusal mechanism we craft today, which merely supplements the § 10 procedure, will promote a smooth and

---

ings, *supra* note 7, neutrality of administrative adjudicators had not become a constitutional command. In short, the rule of impartiality, which has always governed the judiciary, did not apply to agency adjudicators. *Today's mandate for detachment and neutrality is of a federal constitutional dimension.* Recusal cases may hence come to us from the agencies with greater frequency than ever before.

Our judicial commentator points out that "English judges and scholars consider that we [Americans] have simply gone mad" in our tendency to judicialize administrative procedures. *Thus, it is all the more relevant that one of the two elements of "natural justice" which British courts hold essential in all adjudicatory contexts is the right to an unbiased adjudicator. See* Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1269 (1975).

[33] *See* 51 O.S.1991 § 8, *supra* note 24.

efficient processing of agency cases. We caution that a request at an advanced stage of a proceeding may occasion additional delay. A *pro hac vice* Commissioner, appointed while the case is moving toward its completion, would doubtless need additional time to study the record or may require that some of the evidence be re-presented.

SUMMARY

A Corporation Commission adjudicator must meet the standard of neutrality and detachment required of a judge by federal due process. Due process norms apply to the Corporation Commission sitting in a rate-setting proceeding. Upon the disqualification of a Commissioner, a *pro hac vice* vacancy occurs within the meaning of 51 O.S.1991 § 8. In the exercise of his 51 O.S.1991 § 10 powers, the Governor is authorized to fill a *pro hac vice* vacancy created by a Commissioner's recusal. The auxiliary procedure we fashion today for submission of requests to fill *pro hac vice* vacancies will serve as an effective post-recusal mechanism for replacing disqualified adjudicators.

Let the writ issue commanding Commissioner Anthony to certify his disqualification in PUD-260. ORIGINAL JURISDICTION ASSUMED; WRIT OF MANDAMUS GRANTED.

LAVENDER, V.C.J., and HARGRAVE, OPALA, WILSON, KAUGER and WATT, JJ., concur;

SIMMS, J., concurs in part and dissents in part;

HODGES, C.J., disqualified.

SIMMS, J., DISSENTING:

I must respectfully dissent. Today the majority has stripped the sovereign power from the people of this State to choose the members of the Corporation Commission and placed it in the hands of this Court and the Governor. Having been elected by the voters, Commissioner Anthony's tenure in office and conditions of service are fixed by the constitution, art. 9, §§ 15-18, and laws implementing those provisions. He may not be involuntarily removed from that office except as provided by law. *See State, ex rel., Blankenship v. Freeman*, Okl., 440 P.2d 744 (1968). As no vacancy established by law exists, there is no vacancy to fill. See generally, *Carpenter v. Carter*, 167 Okl. 238, 29 P.2d 83 (1939); *Hood v. Miller*, 144 Okl. 288, 291 P. 504 (1930).

In the absence of a constitutional grant of power to do so, this Court has no power to declare a temporary vacancy in the Corporation Commission; neither can it empower the Governor to fill this vacancy. It should be remembered that unlike the legislature, which possesses all power *not denied it* by the federal and state constitutions, the executive and judicial departments have only those powers *granted* to them by the constitution. See generally, *Peebly v. Childers*, 95 Okl. 40, 217 P. 1049 (1923); *Wentz v. Thomas*, 159 Okl. 124, 15 P.2d 65 (1932).

It seems obvious to me that today's intrusions by the majority over the boundaries separating the three departments of government are of no small consequence. While no one would champion corruption or unfair dealing by a public official in any capacity, there is no authority for the majority's resolution of this situation and, in the long run, its decision creates more problems of greater significance for the citizens and their government than it solves.

This Court has repeatedly and consistently recognized that rate-making is a legislative function of the Corpora-

tion Commission. See *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okl. 243, 51 P.2d 327 (1935); *Russell v. Walker*, 160 Okl. 145, 15 P.2d 114 (1932). See also, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908). Even in this opinion the majority continues to recognize that fact (See footnote 13). Now, however, for the first time, the Court crafts rate-makers into a judicial posture and insists that judicial standards be met in a legislative proceeding—thereby creating the foundation for Anthony's involuntary "judicial" disqualification and his removal and replacement by the Governor. There is no authority for the majority's new rule that persons acting in a legislative capacity must meet standards required of judicial decision makers. Certainly *Gibson v. Berryhill*, supra, on which the majority relies, does not support the outcome of this decision. That case involves the Board of Optometry of Alabama, a licensing body, acting in an obvious adjudicatory capacity and has no application to the matter at hand.

Are all state officers now bound to comply with judicial standards of conduct when they act in a legislative capacity? In this regard it is interesting that while the Court imposes judicial standards on Commissioner Anthony when he acts in a legislative capacity, the Court itself, acting in a judicial capacity here, denies Anthony any opportunity to be heard and present evidence in his behalf, thereby violating his rights to due process of law.

If these allegations warrant further inquiry and investigation, the interests of the public will be served and the rights of the Commissioners protected only if the proceedings are brought as provided by law. Only when the facts and circumstances are scrutinized in a proper and open forum, where parties have an opportunity to fully litigate factual issues with competent evidence presented by sworn witnesses, may a lawful adjudication

be made as to whether a Commissioner has forfeited or vacated his office or grounds exist for removal.

I believe that the powers fashioned by the Court in this decision are unauthorized by the constitution and that any action taken in exercise of those powers will be ineffective for all purposes.

APPENDIX C

SUPREME COURT OF OKLAHOMA

No. 74194

STATE OF OKLAHOMA ex rel. ROBERT H. HENRY, Attorney General, and AM[illegible]CAN ASSOCIATION OF RETIRED PERSONS,

Appellants,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Appellee/Cross-Appellant,

and

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Appellee/Cross-Appellee.

Dec. 24, 1991

As Modified on Denial of Rehearing
March 2, 1992

On appeal from an order of the
Corporation Commission

In a proceeding initiated by the Director of the Corporation Commission's Public Utility Division to investigate

the effects of the federal Tax Reform Act of 1986 upon Oklahoma utilities, the Corporation Commission (composed of commissioners Bob Anthony, who concurred in part and dissented in part, Bob Hopkins and James B. Townsend) ordered, among other things, the revision of rates charged to Oklahoma ratepayers by Southwestern Bell Telephone Company (SWB) and the implementation and accounting of service improvement programs to be conducted by SWB.

AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS PRONOUNCEMENT.

OPALA, Chief Justice.

The issues to be resolved in this appeal are: (1) Does American Association of Retired Persons (AARP) have standing to seek corrective relief from the order tendered for review? (2) Is a public service corporation, *i.e.*, Southwestern Bell Telephone Company (SWB), required by law to refund to its ratepayers surplus cash generated by a tax law change? (3) In determining the sum of surplus cash accumulated by SWB, may the Corporation Commission (Commission) include accrued interest? (4) Was it error for the Commission to direct SWB to apply the surplus cash toward upgrading the multi-party line areas of the state to single-party line service? (5) Is the decision to upgrade central offices supported by substantial evidence? (6) Did the Commission impermissibly enlarge its inquiry into the effects of federal tax law changes upon Oklahoma public utilities by also considering evidence of changes in SWB's business operations? (7) If not, (a) Is the Commission's finding that a depreciation reserve deficiency[1] exists supported by sub-

[1] According to the Commission's order "[a] depreciation reserve deficiency arises when depreciation rates previously estab-

stantial evidence? (b) Does SWB's failure to produce certain audit-related information afford the Commission legally sufficient grounds to exclude severance pay expense from SWB's revenue requirements? (c) In calculating SWB's "cash working capital" [2] was it error for the Commission to exclude "local service revenues billed in advance?" and (d) Must the Commission have attributed interest to SWB's excess deferred income taxes? [3] We answer questions 1, 3 and 7(c) in the affirmative and questions 2, 4, 5, 6 and 7(a), (b) and (d) in the negative.

I.

THE CRITICAL FACTS IN LITIGATION

In October of 1986 the Director of the Corporation Commission's Public Utility Division, Howard W. Motley, Jr., initiated proceedings to "inquir[e] into the effect of the 1986 Tax Reform Act on Oklahoma utilities." [4] Twelve companies, including Southwestern Bell Telephone Company (SWB), were named as respondents [5] and ordered to participate in a "technical conference"

---

lished for plant and equipment become inadequate due to technological or physical obsolescence of the plant and equipment." The potential impact of a depreciation reserve deficiency upon rates is discussed in Part VIII of this opinion.

[2] The concept of "cash working capital" is explained in Part X of this opinion.

[3] Part XI of this opinion deals with the question regarding interest on "excess deferred income taxes."

[4] See 26 U.S.C. § 11(b)(1)(C), *infra* note 17.

[5] The other respondents named in the proceeding were Arkansas Louisiana Gas Company, Arkansas Oklahoma Gas Corporation, Empire District Electric Company, General Telephone Company of the Southwest, KPL Gas Service Company, Lone Star Gas Company, Oklahoma Gas & Electric Company, Oklahoma Natural Gas Company, Public Service Company of Oklahoma, Southern Union Gas Company, and Southwestern Public Service Company.

with the Commission's staff (Staff) for the purpose of "establish[ing] the scope of the information required to determine the effect of the Tax Act."[6] According to the appellate record, the proceeding's next stage began on June 12, 1987, when notice was given to SWB and to "all interested parties" of a "hearing on the rates of Southwestern Bell Telephone Company" to be held on June 23, 1987. On the latter date, Staff and SWB stipulated in writing that if the Commission, after taking into account "all known and measurable changes" in SWB's business, determines a reduction in the utility's rates to be warranted, the reduced rates would become effective July 1, 1987, the effective date of the Tax Reform Act of 1986. The Commission approved the stipulation.[7]

At the June 23, 1987 hearing the accounting manager for the Commission's Public Utility Division testified that "the 1986 Tax Reform Act reduced the corporate income tax rate from 46% to 34% . . . which equates to a 40% income tax rate for 1987 and a 34% tax rate prospectively to flow to the customers of Oklahoma." The case was then assigned to a hearing officer for the express purpose of "taking evidence, hearing and reporting thereon to the Commission." The hearing, which was initially set for December 7, 1987, came to be postponed many times because several parties had intervened, including one of the appellants, American Asso-

---

[6] According to director Motley's application, three other matters were slated for consideration at the technical conference: 1) the "timing for providing . . . information for quantification and regulatory treatment, 2) the "unrecorded tax liabilities which have been disclosed for financial reporting purposes but not addressed from a regulatory standpoint" and 3) "the treatment of the tax rate change on deferred taxes related to non-depreciation items." *This opinion does not address itself to any of these considerations.*

[7] The Commission expressly found the terms of the stipulation between SWB and Staff to be "fair, reasonable and equitable."

ciation of Retired Persons (AARP). It eventually took place on January 26, 27, 30 and February 3, 1989.

A myriad of witnesses testified on behalf of the State, SWB, AARP and Staff. In addition to live testimony, several parties offered "pre-filed testimony," which consists of written responses to questions prepared in advance of the hearing. These statements, most of which are accompanied by supporting documentation, were introduced and admitted as exhibits. After the hearing each party tendered its own proposed findings of fact and conclusions of law. The hearing officer adopted Staff's recommendations *in toto*.

Based upon its own assessment of the evidence adduced at the hearing, the Commission adopted nearly all of the findings made by the hearing officer. The Commission findings which are pertinent to the issues tendered in this appeal are: (1) the Tax Reform Act of 1986 reduced the federal corporate income tax rate from 46% to 34% and caused SWB to accumulate $30,677,167.00 in surplus cash between January 1, 1987 and September 30, 1989, (2) "Staff appropriately considered [other] known and measurable changes in SWB's business operations in Oklahoma, (3) a $180 million deficiency exists in SWB's depreciation reserve, (4) Staff was correct in applying October 1986 levels of "separations factors" [8] when calculating SWB's rate base, (5) severance pay expenses were correctly excluded from the determination of SWB's revenue requirements, (6) in calculating SWB's "cash working capital," Staff correctly excluded "local service revenue billed in advance" and (7) interest should not be charged against SWB's excess deferred income taxes.

In accordance with these findings the Commission ordered that (a) interest is to be applied to SWB's surplus cash (or revenue excess) at the annual rate of 11.589%,

---

[8] For the meaning of "separations" see *infra* note 39.

(b) the revenues generated by tax law changes should not be refunded to ratepayers but instead are to be used for upgrading service, *i.e.*, converting multi-party line areas to single-party service and modernizing central offices, (c) SWB must "file tariffs and rate schedules consistent with this order," implement the service improvement programs and rate reductions and submit a "private letter ruling request consistent with the purposes and findings set forth herein" and (d) "as a matter of policy" the depreciation reserve deficiency is to be amortized over a four-year period to provide "rate stability" for Oklahoma ratepayers.[9]

The State, AARP and SWB each seek corrective relief from arious portions of the Commission's order. For the reasons to be stated we affirm in part, reverse in part and remand this cause for further poceedings.

II.

AARP HAS STANDING TO APPEAL

SWB agues that AARP lacks standing to seek corrective relief because it is not aggrieved by the Commission's order. We are told that the State, through the Attorney General's office, and the Commission's Staff sufficiently protect "AARP's interest . . . to the same extent [that the interests of] . . . other ratepayers [are protected]." SWB claims "[t]here is no distinct injury to AARP" and the Commission's order now before us "cannot possibly cause injury, because it not only confers a benefit on

---

[9] The Commission's order also requires Staff to (1) "investigate and determine the adequacy of Southwestern Bell Telephone Company's labor tracking mechanism in Cause No. PUD000662" and (2) "apply to the Commission for an order requiring production of any information which is not produced in a timely manner." SWB, in turn, must "assist the Staff in its investigation in Cause No. PUD000662 concerning the Yellow Pages." Because none of the parties in this appeal complains about any of these portions of the order, we leave them undisturbed.

Oklahoma ratepayers by ordering expenditures of funds for service improvements, it actually reduces mileage charges and rates for MTS and WATS services." [10] We are not persuaded by these arguments. As SWB points out in its own brief, the terms of Art. 9 § 20, Okl.Const.,[11]

---

[10] The Commission's order does call for the following rate reductions:

> "The Commission finds that due to a lower revenue requirement, rate reductions are appropriate in certain categories of service as recommended by Staff witnesses Schroeder and Motley. The Commission finds that the rate design effecting a reduction in mileage charges and intraLATA MTS and WATS recommended by Staff is appropriate, especially because residential local exchange service is currently subsidized and priced substantially below cost and toll rates are priced substantially above costs.
>
> "Therefore, the Commission finds that SWBT shall implement new tariffs immediately in accordance with the following schedule:

	Total Annual Revenue Reduction
Mileage Charges	$6,380,000
IntraLATA MTS and WATS	$1,467,172

> "Mileage charges, currently paid by approximately 100,000 Oklahoma customers, shall be immediately reduced by 50 percent of SWBT's current tariffed rates. In addition, upon the conversion of a given central office (or exchange) to eliminate part-line service, flat rate mileage charges are to be applied as follows:

	Monthly Rate
Within 1 mile of base rate area boundry	$ .77
Outside of 1 mile from base rate area boundary	$3.85

> "All customers affected by the upgrade from the multi-party to single-party service shall be notified by SWBT of any changes in their monthly local exchange rate including immediate conversion to the appropriate one-party rate and mileage charges, as a result of the upgrade."

[11] The pertinent terms of Art. 9 § 20, Okl. Const., provide:

explicitly provide that an appeal may be brought *by "any party affected" or "any person deeming himself aggrieved"* [12] by any action of the Commission affecting the rates of a public service corporation.[13] AARP qualifies as a "party affected" by the order now before us.

AARP's membership is composed of individuals who presumably are ratepayers. SWB does not contend to the contrary. Inasmuch as AARP, on behalf of its membership, had *unsuccessfully* pressed the Commission for a *refund* of SWB's surplus cash, AARP certainly may deem itself aggrieved or affected by the Commission's order, which impacts upon telephone service as well as

---

> *"From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation,* or any individual, person, firm, corporation, reciever or trustee engaged in the public utility business, *an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action,* or by the State, *directly to the Supreme Court of the State of Oklahoma,* in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, *except that such an appeal shall be of right,* and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. * * *" (Emphasis added.)

[12] The term "aggrieved party" includes one whose pecuniary interest in the subject matter is directly and injuriously affected by the decision from which the appeal is brought. *Cleary Petroleum Corp. v. Harrison, Okl.,* 621 P.2d 528, 530 (1980).

[13] A telephone company is a "transmission company," which, in turn, is a "public service corporation" within the meaning of Art. 9 § 34, Okl. Const., *infra. Southwestern Bell Tel. Co. v. State of Oklahoma,* 303 U.S. 206, 58 S.Ct. 528, 62 L.Ed. 751 (1938).

The pertinent terms of Art. 9 § 34, Okl. Const., provide:

> "* * * *The term 'public service corporation' shall include* all transportation and *transmission companies,* all gas, electric, heat, light and power companies. . . ." (Emphasis added.)

rates.[14] AARP doubtless has standing to press for relief in this appeal.[15]

III.

A PUBLIC SERVICE CORPORATION'S SURPLUS CASH GENERATED SOLELY BY CHANGES IN INCOME TAX LAWS NEED NOT BE REFUNDED TO RATEPAYERS

SWB, a public service corporation,[16] undisputedly accumulated over $30 million in surplus funds, which are attributed solely to the federal income tax law change.[17] The State and AARP contend that this sum should be treated as an "overcharge" within the meaning of 17

---

[14] See *Missouri-Kansas-Texas R. Co. v. State*, Okl., 712 P.2d 40, 44 (1985), where an aggrieved unincorporated association was held to have standing to appeal from an order of the Corporation Commission.

[15] SWB had moved (1) to strike AARP's brief in response to SWB's cross appeal as "unauthorized" and (2) to bar AARP from addressing error included in its brief but omitted from its petition-in-error. Inasmuch as AARP has standing to seek corrective relief from the order tendered in this appeal, AARP certainly may respond to SWB's briefs. As for striking portions of AARP's brief, we treat AARP's petition-in-error as amended by brief. See Rule 1.17(a), Rules of Appellate Procedure in Civil Cases, 12 O.S.1981, Ch. 15, App. 2, *infra; Frazier v. Bryan Memorial Hosp. Authority*, Okl. 775 P.2d 281, 284 n. 12 (1989).

The pertinent terms of Rule 1.17(a) provide:

> "*The petition in error may be amended at any time before brief in chief is filed, or thereafter by leave of court,* to include any error or any issue presented to and resolved by the trial court which is supported by the record. . . ." (Emphasis added.)

[16] See *supra* note 13.

---

[17] There is no question that the Tax Reform Act of 1986, *i.e.*, 26 U.S.C. § 11(b)(1)(C), *infra*, decreased the corporate income tax rate from 46% to 34%, effective July 1, 1987, and thereby

O.S.1981 § 121 [18] and hence *refunded* to Oklahoma ratepayers. Although § 121 does expressly require that overcharges be refunded, the question is whether the surplus cash in controversy resulted from "charges . . . in excess of the lawful rate." [19] We hold it did not.

The rates charged by SWB during the period in question (January 1, 1987 to September 30, 1989) clearly were authorized by the Commission. Inasmuch as SWB's accumulation of surplus funds is attributed solely to a decrease in the federal corporate income tax rate, this money was *not* obtained by overcharging ratepayers. Neither may the Commission's finding regarding the

---

caused SWB's accumulation of surplus revenue or cash. The terms of 26 U.S.C. § 11(b)(1)(C) provide:

"(a) Corporations in general.—A tax is hereby imposed for each taxable year on the taxable income of every corporation.

"(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) shall be the sum of—

* * * *

(C) 34 percent of so much of the taxable income as exceeds $75,000.

In the case of a corporation which has taxable income in excess of $100,000 for any taxable year, the amount of tax determined under the preceding sentence for such taxable year shall be increased by the lesser of (i) 5 percent of such excess, or (ii) $11,750."

[18] The terms of 17 O.S.1981 § 121 provide:

"The Corporation Commission is hereby vested with the power of a court of record to determine: First, *the amount of refund due in all cases where any public service corporation,* person, or firm, as defined by the Constitution, *charges an amount for any service rendered by such public service corporation,* person, or firm, *in excess of the lawful rate in force at the time such charge was made, or may thereafter by declared to be the legal rate which should have been applied to the service rendered;* and, second, *to whom the overcharge should be paid.*" (Emphasis added.)

[19] See 17 O.S.1981 § 121, *supra* note 18.

federal tax law's effect upon SWB be regarded as a declaration that a different rate should have been charged. In short, § 121 affords *no* authority for requiring the refund sought by AARP and the State.

IV.

SWB IS ACCOUNTABLE FOR INTEREST ON THE SURPLUS CASH IN SUIT

SWB urges that the Commission erred in charging or holding it accountable for interest on the surplus cash generated by the decrease in the federal corporate income tax rate. We reject this contention. The briefs contain no authority which militates in favor of reversing the Commission's decision. It is beyond question that SWB had the use of the funds whose availability stands attributed to a tax law change alone and which came to SWB without consideration of its rate base.[20] "The presumption in the business world . . . and [in] equity, is that the use of money normally calls for the payment of interest." [21] We find this rule to be applicable in this case.[22]

---

[20] "Rate base" is the amount upon which the utility is permitted to make a profit; it is based upon the value of property "used and useful in the public service business at the time the inquiry was made." *Turpen v. Oklahoma Corp. Com'n*, Okl., 769 P.2d 1309, 1320 n.25 (1989).

[21] *In re Will of Kalicicki*, 33 Wis.2d 277, 147 N.W.2d 343, 348 (1967). See also *United Gas Improve. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 230, 86 S.Ct. 360, 364, 15 L.Ed.2d 284 (1965), where the Court held that "the imposition of interest on refunds [paid by natural gas producers for charging excessive rates] *is not an inappropriate means of preventing unjust enrichment;*" *Phillips Petroluem Company v. Adams*, 513 F.2d 355, 368 (5th Cir.1975), where the court applied the equitable doctrine of unjust enrichment to require a pipeline company to pay interest on the principal sum it owed mineral interest owners and had held as "suspense money" pending a federal regulatory agency's decision.

[22] We also note that our decision regarding interest on the surplus cash accumulated by SWB is consistent with the legislature's

V.

SWB'S SURPLUS CASH MAY BE USED TO ELIMINATE MULTI-PARTY LINES IN THIS STATE

Having held that SWB need not refund its surplus cash to ratepayers, the next question to be answered is whether the Commission erred by directing SWB's use of those funds to upgrade telephone service. We answer in the negative.

The record leaves no doubt that the Commission viewed SWB's accumulation of surplus revenue as presenting a "unique opportunity to accomplish service and central office upgrades [23] in a manner which eliminates any adverse impact on basic exchange rates and any burden on ratepayers." [24] The Commission's decision in this regard was hence one of "policy," [25] and this court is not

---

view that interest is chargeable on the amount due a customer who paid an excessive rate. See the amended version of 17 O.S. 1981 § 121, found in Okl.Sess.L.1991, ch. 332 § 1, effective July 1, 1991, whose pertinent terms provide:

> "The Corporation Commission is hereby vested with the power of a court of record to determine: First, *the amount of refund due and any interest owing upon such refund* in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge was made. . . ." (Emphasis added.)

[23] Part VI of this opinion deals with the Commission's approval to use part of SWB's surplus cash for central office improvements.

[24] The quoted language is excerpted from the Commission's order.

[25] The Commission's order further explains that "[o]ne of the most important goals espoused consistently over the years by this Commission has been the goal of universal service. Inherent in this goal is not only bringing affordable telephone service to the greatest number of people, but also providing the highest quality

free to disturb that ruling if it is supported by "substantial evidence." [26]

The Commission's efforts to replace multi-party lines with single-party connections are complemented by the "impossibility of identifying specific ratepayers" who would be entitled to a refund. Indeed, it would be inequitable to distribute funds based on some artificial formula that lacks a relation to the ratepayers' entitlement. In any event, there can be no doubt that the service improvements ordered by the Commission are *inherently beneficial* and supported by substantial evidence.[27] On this record we are not free to block the Commission from pursuing its "goal of universal service by implementing [this improvement program]." [28]

---

service available. This Commission has had a longstanding service improvement program, but due to financial constraints, it has not been possible to implement such a program in a relatively short time frame."

[26] See *infra* note 30.

[27] The Commission found that "[u]pgrading multi-party service to single-party service will directly benefit approximately 54,000 Oklahoma customers who now have multi-party service. The Commission notes that the public comments submitted to this Commission overwhelmingly favored the proposed upgrade programs. All ratepayers will benefit indirectly from these programs. As the Staff explained in its testimony, and as explained in the Report of the Hearing Officer, the capital improvement plan proposed by the Staff avoids the borrowing costs and other costs that would normally be associated with such an ugrade. Such borrowing costs would normally be permissible and recoverable by SWBT as costs of service. By avoiding such costs, rates are kept lower for all Oklahoma ratepayers." *None of these findings is challenged in the briefs.*

[28] The Commission found that $30,677,167 of SWB's surplus revenue should be applied as follows:

"I. Party Line Elimination Program

Capital Cost	$13.3 million
Conversion Expense	4.9 million
Total Cost	$18.2 million

[Continued]

VI.

THE DECISION TO UPGRADE CERTAIN CENTRAL OFFICES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission approved the expenditure of a portion of SWB's surplus cash for upgrading fourteen "central offices" listed in one of Staff's exhibits.[29] The State and AARP contend that the decision to improve *these particular facilities* lacks evidentiary support. We agree.

None of the parties challenges the Commission's finding that "[c]entral [o]ffice upgrades will improve the quality of service . . . and increase the level of technology available to customers. . . ." Nor is there any clear denial that modernization is generally needed. The fatal weakness in the Commission's choice of facilities lies in *undisputed* testimony that Staff's "Project Priority List"—upon which the Commission relied—was presented as "simply a listing of projects that one might consider." Staff's list of priority upgrade projects differed from that

---

[28] [Continued]

"II. The remaining balance plus interest accruing from the date of this order shall be invested in central office service upgrades. "The Party Line Elimination Program shall begin immediately. Staff shall monitor the progress and the costs of the Program, and SWBT shall submit quarterly reports to Staff as to the progress and costs expended until completion of the Program. SWBT shall also perform any necessary conversion of modifiable customer telephone sets. Customers shall not be charged for the costs of modifications. Such costs shall be included in the cost of the upgrade programs. The Commission directs the Company to file appropriate tariffs to accomplish this party line elimination program."

[29] A "central office" is "[a] switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building." 47 C.F.R. Part 36, App. at 581.

of SWB. Moreover, a witness for Staff even understood that a separate hearing would be held to evaluate the central offices slated for upgrading. In light of these admissions, it is no wonder that the Commission's order contains no reference to any specific information that could provide a basis for upgrading the listed central offices.

The Commission's order regarding the upgrade of Staff's proposed list of central offices hence cannot be sustained. A hearing should be conducted on remand to determine specifically *which* central offices are most in need of improvement or modernization.

VII.

THE COMMISSION'S ENLARGEMENT OF ITS INQUIRY TO INCLUDE CONSIDERATION OF CHANGES IN SWB'S BUSINESS OPERATIONS IN THIS PROCEEDING DOES NOT CONSTITUTE REVERSIBLE ERROR

AARP complains that since the proceeding before the Commission had been initiated solely to inquire into the impact of the Tax Reform Act of 1986 upon Oklahoma public utilities, the Commission impermissibly expanded the scope of its probe when it allowed SWB to present evidence of changes in its business operations. We disagree. The error urged here was not accompanied by a showing that AARP had been prejudiced by the inquiry's expansion. AARP makes no showing of this kind.

AARP urges that the Commission erred by failing to disregard "known and measurable changes in SWB's business operations." Had SWB's accumulation of surplus cash not been attributable to a tax law change but instead was caused by some other factor, i.e., a significant drop in the price of "energy", SWB would still benefit from the surplus. Under those circumstances as well as under the facts in this case it would *be inherently unfair*

for the Commission to consider the surplus income in total separation or isolation of other utility needs.

In any event AARP has failed to show that the issues joined by SWB are *not* intertwined with the other elements which bear upon the rate structure. The scope of the Commission's inquiry was sound from legal, accounting and economic points of view. We hence conclude that the Commission did not abuse its discretion by considering evidence of changes in SWB's business operations in conjunction with its inquiry's original stated purpose.

VIII.

THE COMMISSION'S FINDING OF A DEPRECIATION RESERVE DEFICIENCY LACKS SUBSTANTIAL EVIDENTIARY SUPPORT

The State's prime contention in this appeal, which is also included in AARP's assignments of error, is that the Commission's finding of a deficiency in SWB's depreciation reserve not only lacks any foundation in substantial evidence but also is unsupported by *any* evidence at all.[30] Among the "known and measurable changes" pertaining to business operations, the Commission considered SWB's depreciation reserve and found that a deficiency exists in

---

[30] Decisions by the Corporation Commission may be vacated if they lack the support of "substantial evidence." See Art. 9 § 20, Okl. Const., whose pertinent terms provide:

> "* * *
>
> "The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving [an] . . . asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. *In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine* whether the Commission has regularly pursued its authority, and *whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.*" (Emphasis added.)

the amount of $180 million. For the reasons to be stated, we reverse this portion of the Commission's order.[31]

"Depreciation reserve" refers to

> "an accounting technique whereby a fund is built up from annual contributions, as an item of expense of operation, over a period of time representing the service life of a public utility plant to offset and to equal in value the ultimate total loss through use of the utility property so that at the end of such service life the depreciation reserve fund will replace the property so worn out by the various factors of depreciation." [32] (Citation omitted.)

A deficiency in the depreciation reserve is hence generated when the useful life of the property is unexpectedly reduced. In the words of the Commission a depreciation reserve deficiency "arises when depreciation rates previously established for plant and equipment become inadequate due to technological or physical obsolescence of the plant and equipment." In the scheme of rate structure, depreciation is an allowance given to SWB, *i.e.*, an operating expense,[33] by which the cost of an investment may be recovered through the rates charged.

If, for example, the useful life of an item of equipment had initially been predicted to be 10 years, but its life expectancy is later found to be no more than 6 years, then the rate base would be reduced faster than initially planned. The result is an increase in current operating

---

[31] The State and AARP also contend that the Commission abused its discretion by treating the depreciation reserve deficiency as a debt and amortizing it over a four-year period. Because we reverse the Commission's finding that such a deficiency exists, we need not address the amortization issue.

[32] *Off. of Consumers' Council v. P.U.C. of Ohio*, 6 Ohio St.3d 405, 453 N.E.2d 584, 585-586 (1983).

[33] *Turpen v. Oklahoma Corp. Com'n*, *supra* note 20 at 1316 n. 7.

expenses, which could warrant an increase in rates charged to customers. As an asset depreciates over time in accordance with a schedule (*or rate*) that is based on an estimate of the asset's useful life, the rate base is reduced. A reduced rate base, in turn, means a decreased return on the investment. In short, when equipment becomes either less useful or obsolete, the schedule of depreciation becomes inadequate. This, in turn, gives rise to a deficiency in depreciation reserve. The question for us to resolve here is whether the Commission's finding that SWB has a depreciation reserve deficiency is supported by substantial evidence. This we answer in the negative.

The record reveals, and there is no question, that the Commission's reserve deficiency finding is based upon the testimony of a single Staff witness. According to the Commission's order, "[t]he amount of the depreciation reserve deficiency *was established for SWB at the 1986 Three-Way Meeting* wherein SWBT, Commission Staff and the FCC [Federal Communications Commission] staff met together for the purpose of *discussing* depreciation rates for SWBT." (Emphasis added.) Staff's witness "fully participated in this three-way process . . . [where] *Staff* reviewed the depreciation rates for each account and the reserve imbalance *which the FCC had verified to exist* through the use of computer programs which analyze data supplied by SWB. Staff's calculations took into account a total state reserve deficiency of $180 million." (Emphasis added.) So noted the Commission.

As a result of this meeting *the FCC* determined that a depreciation reserve deficiency exists. Although the Commission may have, in SWB's words, "made its own independent decision" regarding reserve deficiency, we conclude that the ruling at hand consists of no more than a decision *to agree with the FCC's determination that a deficiency exists.*

SWB admits in its brief that "Staff [had] recommended to the Commission the depreciation reserve deficiency

amount only after being furnished with and reviewing capacious records related to SWBT in Oklahoma. This process included presentation of voluminous depreciation data (binders) *to the FCC . . . .*" (Emphasis added.) Although SWB relies heavily upon the notion that this evidence is undisputed, *none of this data was tendered for the Commission's own consideration.* It is also undisputed that the Commission relied upon *its Staff's participation* in the Three-Way Meeting and that its Staff had *there* relied upon *the FCC's assessment* of data and records *which SWB had voluntarily supplied.* In addition, the Commission approvingly observed in its order that "[*S*]*taff* had the opportunity to review the audit *conducted* by the FCC and was satisfied concerning its accuracy." [34] (Emphasis added.)

Staff urges that its witness provided expert testimony upon which the Commission could rely in making its factual determination that a depreciation reserve deficiency exists. We reject the notion that there is an "evidentiary" foundation upon which the Commission's finding is grounded, since it considered no specific data or documentation that could satisfy the "substantial evidence" standard.[35]

The evidence upon which the Commission based its finding consists of expert testimony about data *dehors the record.* This is no substitute for the *Commission's own*

---

[34] Staff and SWB had stipulated early in the proceeding that an audit was necessary. Yet rather than take steps to inspect SWB's records, Staff, and eventually the hearing officer and the Commission, all relied upon the FCC's findings, which were derived from data that SWB voluntarily produced *for the FCC's consideration* at the Three-Way Meeting.

[35] "Substantial evidence" possesses substance and is consequential; it denotes "fitness to induce conviction." *Pannell v. Farmers Union Co-operative Gin Ass'n,* 192 Okl. 652, 138 P.2d 817, 818-819 (1943); *Turpen v. Oklahoma Corp. Com'n, supra* note 20 at 1317.

assessment of evidence before it. Indeed, not even the common law's "summary rule," now codified in 12 O.S. 1981 § 3006,[36] can cure this defect in proof. The summary rule permits an expert to summarize a mass of data and reports before the court. Testimony of this nature is admissible even though its basis, *i.e.*, the mass of materials, has not been admitted into evidence.[37]

Had the summary rule been invoked by the evidence's proponents, *the raw data's availability would have been required for inspection by the opposing party.* Without question the raw data upon which the witness relied here was neither tendered nor made available otherwise in the course of proceedings before the Commission.[38] In short, because the summary rule's sound application presupposes the existence of an underlying pool of raw data before the tribunal and hence available for examination

---

[36] The terms of 12 O.S.1981 § 3006 provide:

"The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, *summary or calculation.* The originals, or duplicates, *shall be made available for examination or copying, or both, by other parties at a reasonable time and place.* The judge may order that they be produced in court." (Emphasis added.)

[37] *Suttle v. Chadwell*, 196 Okl. 298, 164 P.2d 880, 882 (1946) (the court's syllabus ¶ 5).

[38] See *State v. Southwestern Bell Tel. Co.*, Okl., 662 P.2d 675, 681 (1983), where this court held that "*due process* and the requirement of full hearing do[es] not preclude . . . a fact finding agency [from considering] . . . evidence and conclusions reached in proceedings not conducted in the personal presence of the [agency's] members . . . *provided that the individual members of the fact finding agency . . . making [the] . . . determination . . . consider[s] and appraise[s] the evidence which justified the conclusions reached by the fact finder made outside the presence of the determining body.*" (Emphasis added.) There is no dispute in the instant case that the Commission considered *none* of the specific information that had been before the FCC.

during the proceeding—and nothing less will suffice—it affords no safety net for the Commission's finding.[39]

Nor do the terms of 75 O.S.1981 § 310(4)[40] dispense with the need for either the Commission's own assessment of data or the latter's availability at the proceeding. Section 310(4) provides that "notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge." Although the terms of this section of the Administrative Procedures Act, 75 O.S.Supp.1990 § 250 *et seq.*, do not apply to the Com-

---

[39] In this appeal SWB also urges that the Commission arbitrarily, and hence erroneously, "froze"—at the October 1986 levels—the separations factors *applicable to depreciation reserve deficiency alone.* The term "separations" describes "[t]he process by which telecommunications property costs, revenues, expenses, taxes and reserves are apportioned . . . [between state and interstate business]." 47 C.F.R. Part 36, App. at 585; 47 C.F.R. § 36.1(b). *Because today we reverse the Commission's finding that a depreciation reserve deficiency exists, we need not consider SWB's quest for corrective relief regarding separations factors.* Indeed, we should withhold our review of the formula applied by the Commission for allocating depreciation reserve deficiency, if any does exist between state and interstate facilities. By the time a hearing on remand is conducted there may be new separations standards to apply. *This court will not anticipate the existence of a fact; nor will it forecast an appellate response to a fact not yet of record.*

[40] The terms of 75 O.S.1981 § 310(4) provide:

> "(4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties *shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.* The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." (Emphasis added.)

mission,[41] the minimum standards of due process embodied in § 310(4) nonetheless do.[42] In any event, the record does not indicate the Commission, however informally, took "notice" of the FCC's findings and invited the opposing parties to meet the extra-record material by rebuttal. Rather, the Commission simply *adopted* a mass of proof without the benefit of a proper predicate. Moreover, the extra-record "facts" described by the testimony as supportive of the depreciation reserve deficiency finding would not necessarily qualify as "generally recognized technical facts."

IX.

THE COMMISSION SHOULD HAVE CONSIDERED SWB'S SEVERANCE PAY EXPENSES

Among the factors SWB pressed for consideration by the Commission was severance pay expense. Although Staff had earlier agreed with SWB that $4.7 million is an appropriate sum to be included in calculating the utility's revenue requirement, Staff nevertheless excluded it from their proposal. The Commission also chose to disallow SWB's severance pay expense. On this point we reverse.

According to the Commission's order, Staff's treatment of severance pay was correct "*because Staff was unable to verify annualized wage levels* due to the methodology that SWBT uses to track its Oklahoma labor costs."

---

[41] See 75 O.S.Supp.1990 § 250.4(B)(4), whose terms provide:

"B. As specified, the following agencies or classes of agency activities are not required to comply with the provisions of Article II of the Administrative Procedures Act [75 O.S.Supp. 1990 § 309 *et seq.*]:

"* * *

"4. The Oklahoma Corporation Commission; * * *"

[42] See *Teleco, Inc. v. Corporation Com'n*, Okl., 653 P.2d 209, 214 (1982); *C.F. Braun & Co. v. Corporation Commission*, Okl., 609 P.2d 1268, 1273-1274 (1980).

(Emphasis added.) This explanation, though uncontroverted, leaves us with no doubt that the Commission's decision in this regard is arbitrary and hence cannot be sustained.

The basis for disallowing severance pay expense is not questioned by any party. The State, AARP and Staff all agree that SWB either failed or was unable to supply Staff with a "labor-tracking mechanism," that is, audit information for allocating wage and non-wage data between state and interstate jurisdictions. While SWB does not deny this, none of its opponents has offered any explanation as to how an allowance for severance pay expenses is dependent upon a labor-tracking audit. Neither have we been offered a reason to doubt SWB's assertion that

> "the breakdown of each regulatory account between wage and non-wage data does *not* mean that SWBT has non-verifiable or non-auditable severance pay expenses. Total payroll expenses for Oklahoma employees, and total severance pay expenses are easily audited, and were verified by Staff. The verifiability of these expenses does not depend on being able to go to the regulatory account for maintenance expenses, for example, and break down that account between wage and non-wage data. That type of breakdown has nothing to do with the keeping of records relating to severance pay, which Staff in fact audited."

SWB's failure or refusal to produce records, data or other information can make it subject to the Commission's contempt or other coercive powers.[43] These cir-

---

[43] See Art. 9 § 19, Okl. Const., *infra;* 117 O.S.1981 §§ 2 and 153, *infra.*

The pertinent terms of Art. 9 § 19, Okl. Const., provide:

> "*In all matters* pertaining to the public visitation, regulation, or control of corporations, and *within the jurisdiction of the Commission, it shall have the powers and authority of a court*

cumstances are no substitute for having substantial evidence in support of an order. The Commission's disallowance of SWB's severance pay expense must hence be disapproved on the present record, subject to further consideration on remand.

X.

THE COMMISSION MISCALCULATED SWB'S CASH WORKING CAPITAL

The next issue involves the Commission's computation of SWB's "cash working capital" requirement. Cash working capital refers to the amount of cash needed from

---

of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, *and to enforce compliance with any of its lawful orders or requirements . . . .*" (Emphasis added.)

The pertinent terms of 17 O.S.1981 § 2 provide:

"*In case of failure of any corporation,* person or firm *to obey or comply with any order or requirement of the Corporation Commission, the Commission may punish* such corporation, person or firm, as *for contempt.* Such contempt proceedings may be instituted by any citizen of this state, or other parties affected by such order, by filing an affidavit with the Corporation Commission, setting forth the acts of omission or failure to comply with such order or requirement. * * *" (Emphasis added.)

The terms of 17 O.S.1981 § 153 are:

"In addition to the powers enumerated, specified, mentioned or indicated in this act, *the Commission shall have all additional implied and incidental powers* which may be proper and necessary to carry out, perform and execute all powers herein enumerated, specified, mentioned, or indicated, and *to punish as for contempt such corporation,* association, company or individual, their trustees, lessees, receivers, successors and assigns, *for the disobedience of its orders in the manner provided for punishment of* transportation and *transmission companies* by the Constitution and laws of this state." (Emphasis added.)

the utility's own funds to meet current obligations as they arise during the lag period between services rendered and collection of revenues.[44] Using a "modified formula approach" the Commission found that SWB had a *negative* cash working capital requirement, which indicates the utility needs no cash to sustain its operations between the time services are rendered and the time payment for them is received. SWB contends the opposite—that it has a *positive* cash working capital requirement and hence needs cash during this period. SWB claims that its conclusion is based upon the Commission's own "modified formula approach," while the State, AARP and Staff maintain that it is based upon a flawed "lead-lag" study.[45] SWB submits that the only reason it offered the lead-lag study was because its availability was mandated by the Commission during SWB's previous rate-making case.

According to SWB, the Commission's calculations are flawed because Staff based its approach on an "instant receipt" assumption—namely that revenues are received on the date of billing. We are told this assumption is erroneous because (1) bills are not mailed to customers until one week after the billing date and (2) there is a lag period of approximately twenty-five days from the date of the bill to the date of payment.

While it is not clear from the record whether Staff actually used the "instant receipt" assumption in its cal-

---

[44] *Boise Water Corp. v. Idaho Public Util. Commission*, 97 Idaho 832, 555 P.2d 163, 166 (1976); *City of Pittsburgh v. Pennsylvania Public Util. Com'n*, 370 Pa. 305, 88 A.2d 59, 61 (1952); *Southern New England Tel. Co. v. Public Util. Com'n*, 29 Conn. Supp. 253, 282 A.2d 915, 921 (1970); *Anaheim, Riverside, etc. v. Fed. Energy Reg. Com'n*, 669 F.2d 799, 805 (D.C.Cir.1981).

[45] "A lead-lag study divides the total adjusted operating expenses for the test year by the number of days in the year to arrive at an average daily expense requirement. That figure is then multiplied by the average resale class revenue lag time (in days) to yield an actual working cash requirement." *Anaheim, Riverside, etc. v. Fed. Energy Reg. Com'n, supra* note 44 at 805.

culations, Staff's approach at least appears to lack a basis in substantial evidence. SWB does not challenge Staff's use of the "modified formula approach," though the Commission did fail to specify the particular factors it employed. Neither did it state whether it considered the lag in rendition of services and receipt of payment therefor. Moreover, the briefs direct us to no evidence of how Staff's calculations resulted in a negative cash working requirement, while SWB, using the same "modified formula approach," arrived at a positive cash working capital requirement. Because the Commission's determination of SWB's cash working capital requirement is not sustained by substantial evidence, we disapprove of this part of its order and remand the issue to the Commission for further consideration.

XI.

THE COMMISSION'S DECISION NOT TO CONSIDER INTEREST ON SWB'S EXCESS DEFERRED INCOME TAXES WILL NOT BE DISTURBED

The State and AARP contend that the Commission erred by failing to charge interest on SWB's excess deferred income taxes. Because the briefs fail to provide us with a record-supported argument that would defeat the basis for the Commission's decision, we must affirm.

The hearing officer's report explains that "[e]xcess deferred income taxes are the result of timing differences between tax expenses charged for books and taxes payable to the state and federal governments. Any differences are accumulated in the deferred income tax balance and are deducted from rate base until the taxes are actually paid to the government."

Here, SWB collected from the ratepayers sums sufficient to satisfy the 46% income tax rate but paid taxes for 1987 at 40% and at 34% in 1988 and the prospective year. An excess is thus created because the deferred

tax balance became greater than the amount of taxes actually paid. The Commission decided that it would not be appropriate in this case to charge interest for SWB's excess deferred income taxes. This is so because ratepayers are benefited when the excess is deducted from the rate base, thus lowering the revenue requirement. According to the hearing officer's report, charging this interest would result in a substantial revenue deficiency, and consequently, the need to raise telephone rates.[46]

The AARP contends that this decision is erroneous because, in their view, "[i]f the Commission would immediately refund to the ratepayers who paid the deferred income taxes, these ratepayers could immediately deposit the money in the bank and draw interest on it."[47] The AARP also contends that there is no substantial evidence the ratepayers will receive any benefit by SWB's retention of the excess deferred income taxes, as the Commission has permitted.[48]

---

[46] The evidence upon which the Commission relied includes testimony from the following witness as summarized in the hearing officer's report:

> "[Shirley Norman:] Even though the unprotected excess deferred income taxes are proposed to be flowed back to the ratepayers over two years, and the unprotected excess deferred income taxes are to be flowed back pursuant to ARAM, *all of the excess deferred income taxes will eventually be flowed back to the ratepayers. If Staff hadn't reduced SWB's rate base by the amount of excess deferred income taxes, there would have been a very large revenue deficiency in each of the three test periods used in this case.* The 1987 revenue deficiency would have been $38.4 million, the 1988 revenue deficiency would have been $22.8 million, and the prospective revenue deficiency would have been $28.7 million. However, *by reducing SWB's rate base by the $63.2 million excess deferred income taxes amount, a revenue excess for each of the three test periods results.*" (Emphasis added.)

[47] The quoted text is excerpted from AARP's brief.

[48] The State does not join in AARP's complaint regarding interest on excess deferred income taxes.

Every finding of the Corporation Commission made in matters it frequently adjudicates and in which it possesses expertise is accompanied by a presumption of correctness if supported by substantial evidence.[49] Although AARP did present expert testimony favoring its position,[50] the Commission's decision is nonetheless supported by substantial evidence. Moreover, upon this point AARP's brief offers no clear basis for overcoming the law's presumption of correctness that attaches to the Commission's decision. We hence leave that part of the order undisturbed.

AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS PRONOUNCEMENT.

LAVENDER, SIMMS, DOOLIN, HARGRAVE and ALMA WILSON, JJ., concur.

KAUGER and SUMMERS, JJ., concur in result.

HODGES, V.C.J., disqualified.

---

[49] *Teleco, Inc. v. Corporation Com'n, supra* note 42 at 212; *Turpen v. Oklahoma Corp. Com'n, supra* note 20 at 1317.

[50] According to one of AARP's witnesess, Joseph William Mihuc, whose testimony is summarized in the hearing officer's report,

> "interest should accumulate on the excess deferred income taxes to compensate the ratepayers for advancing payment to pay the taxes. All taxes collected from the ratepayers, but not currently refunded, should continue to accumulate interest until refunded. The excess deferred income taxes should be deducted from SWB's rate base and amortized and returned to the ratepayers along with interest at SWB's authorized rate of return, 11.85%.
>
> "The flow back of unprotected excess deferred income taxes should be made to the ratepayers in the form of a cash refund as soon as possible."

APPENDIX D

CONSTITUTION OF THE STATE OF OKLAHOMA
ARTICLE IX. CORPORATIONS
CORPORATION COMMISSION

§ 15. Creation—Terms of office—Vacancies

A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: Provided, Corporation Commissioners first elected under this Constitution shall hold office as follows: One shall serve until the second Monday in January, nineteen hundred and nine; one until the second Monday in January, nineteen hundred and eleven; and one until the second Monday in January nineteen hundred and thirteen; their terms to be decided by lot immediately after they shall have qualified. In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term.

§ 16. Qualifications of commissioners

The qualifications of such commissioners shall be as follows: To be resident citizens of this State for over two years next preceding the election, and qualified voters under the Constitution and laws, and not less than thirty years of age; nor shall such commissioners, or either of them, be, directly or indirectly, interested in any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, operated for hire, in this State, or out of it, or any stock, bond, mortgage, security, or earnings of any such railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, compress or elevator companies; and if such Commis-

sioner shall voluntarily become so interested, his office shall become vacant; and if any Corporation Commissioner shall become so interested otherwise than voluntarily, he shall, within a reasonable time, divest himself of such interest; and failing to do this, his office shall become vacant. Nor shall any such commissioner hold any other office under the government of the United States, or of this State, or any other state government, and shall not, while such Commissioner, engage in any occupation or business inconsistent with his duties as such commissioner.

§ 17. Oath of office—Additional oath

Before entering upon the duties of his office, each of said commissioners shall take and subscribe to the oath of office as prescribed in this Constitution and shall, in addition thereto, swear that he is not, directly or indirectly, interested in any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, nor in the bonds, stocks, mortgages, securities, contract or earnings of any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line; and that he will, to the best of his ability, faithfully and justly execute and enforce the provisions of this Constitution, and all the laws of this State concerning railroads, street railways, traction lines, canals, steam boats, pipe lines, car lines, sleeping car lines, car associations, express lines, telephone and telegraph lines, compress and elevator companies, and all other corporations over which said Commission has jurisdiction, which oath shall be filed with the Secretary of State.

§ 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transporta-

tion, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published one time in substance in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed general order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall im-

pair the rights which have heretofore been, or may hereafter be, confererd by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

§ 19. Powers of court of record—Additional powers—Failure or refusal to obey orders

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed

by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense: Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

§ 20. Appeals to Supreme Court—Other courts to have no jurisdiction—Mandamus and prohibition

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Suprme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right,

and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the public utility or public service corporation affected by any such action, the State of Oklahoma shall be made the appellee, but in other appeals hereunder, the public utility or public service corporation affected shall be made the appellee.

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative.

The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States of the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Com-

mission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.